

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(JMP)

Case No. 08-01420(JMP)(SIPA)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.,

Debtors.

- - - - -x

In the matter of:

LEHMAN BROTHERS INC.,

Debtor.

- - - - -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

January 13, 2010

10:12 a.m.

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

1 DEBTORS' Motion Requesting Joint Administration of the Chapter
2 11 Cases of LB Somerset LLC and LB Preferred Somerset LLC

3
4 DEBTORS' Motion for a Determination That Certain Orders and
5 Other Pleadings Entered or Filed in the Chapter 11 Cases of
6 Affiliated Debtors be Made Applicable to the Chapter 11 Cases
7 of LB Somerset LLC and LB Preferred

8
9 DEBTORS' Motion to Extend the Time to File LB Somerset LLC's
10 and LB Preferred Somerset LLC's Schedules, Statements of
11 Financial Affairs, and Related Documents

12
13 DEBTORS' Motion to Strike William Kuntz's Notice of Appeal of
14 the Order Authorizing Lehman Commercial Paper Inc. to Purchase
15 Fairpoint Participation

16
17 DEBTORS' Motion for Authorization and Approval of a Settlement
18 Agreement With the Insolvency Administrator of Lehman Brothers
19 Bankhaus AG (In Insolvenz)

20
21 MOTION of Merrill Lynch International for Relief From the
22 Automatic Stay

23
24 LBHI's Motion for Authorization to Sell Certain Asset Backed-
25 Securities and Related Relief

1 MOTION of Seattle Pacific University Compelling Lehman Brothers
2 Special Financing Inc. to Assume or Reject Executory Contracts

3
4 LEHMAN Brothers Special Financing Inc.'s Motion to Strike
5 Capital Automotive L.P.'s Objection to Debtors' Motion to
6 Compel Performance

7
8 JOINT Motion of Sea Port Group Securities and Berner
9 Kantonalbank to Deem Proofs of Claim to be Timely Filed by
10 Securities Programs Bar Date

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12 MOTION of the Debtors for Establishment of Procedures for the
13 Debtors to Compromise and Settle Pre-Petition Claims Asserted
14 by the Debtors Against Third Parties

15
16 DEBTORS' Motion for Approval of Claim Objection Procedures and
17 Settlement Procedures

18
19 MOTION by Insolvency Administrator and Foreign Representative
20 for Authorization to Enter Into and Approval of a Settlement
21 Agreement With the Lehman Parties

22
23
24
25

1 THIRD Application of Hughes Hubbard & Reed, LLP for Allowance
2 of Interim Compensation for Services Rendered and Reimbursement
3 of Actual and Necessary Expenses Incurred from June 1, 2009
4 Through September 30, 2009

5
6 PRETRIAL CONFERENCE

7 Federal Home Loan Bank of Pittsburgh v. Lehman Brothers
8 Holdings Inc., et al.,

9
10 MOTION of Tuxedo Reserve Owner LLC and Tuxedo TPA Owner LLC for
11 an Order Compelling Actions by Debtors as Agent and Lender
12 Under Loan Facility

13
14 DEBTORS' Motion to Compel Performance by AIG CDS, Inc. of its
15 Obligations Under an Executory Contract and to Enforce the
16 Automatic Stay

17
18 MOTION of Laurel Cove Development for an Order Directing Debtor
19 to Assume or Reject an Executory Contract

20
21 MOTION of U.S. Bank National Association for Relief From the
22 Automatic Stay

23

24

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1 MOTION to Compel Performance of Capital Automotive L.P.'s
2 Obligations Under an Executory Contract and to Enforce the
3 Automatic Stay

4
5 MOTION of 1407 Broadway Real Estate LLC and PGRS 1407 BWAY LLC
6 for an Order (I) Compelling Certain of the Debtors to Comply
7 With Their Lending Obligations

8
9 NOTICE of Debtors' Objection to Proof of Claim Filed by David
10 Schwartzman

11
12 MOTION of U.S. Bank National Association for Relief From
13 Automatic Stay

14
15 MOTION of U.S. Bank National Association for Relief From
16 Automatic Stay

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18 MOTION of Property Asset Management Inc. for Relief From the
19 Automatic Stay

20
21 MOTION of U.S. Bank National Association for Relief From the
22 Automatic Stay

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1 MOTION of Debtors to Compel Performance of Board of Education
2 of the City of Chicago's Obligations Under an Executory
3 Contract and to Enforce the Automatic Stay

4
5 MOTION of Official Committee of Unsecured Creditors for
6 Reconsideration of Court's September 17, 2008 Interim Order
7 Authorizing Debtor to Obtain Post-Petition Financing

8
9 MOTION of WWK Hawaii-Waikapuna, LLC, et al. for Relief From the
10 Automatic Stay

11
12 FIRST Motion of Mark Glasser to Extend Time for Claim

13
14 MARKIT Group Limited's Motion for Relief from the Automatic
15 Stay to Terminate Data Services Agreement and Associated
16 Addenda

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18 MOTION of Newport Global Opportunities Fund LP, Newport Global
19 Credit Fund (Master) L.P., PEP Credit Investor and Providence
20 TMT Special Situations Fund L.P. for Leave to Conduct Rule 2004
21 Discovery of Lehman Brothers Inc. and the SIPA Trustee

22
23 LEHMAN Brothers Special Financing Inc.'s Motion to Dismiss in
24 Chicago Board of Education v. Lehman Brothers Special Financing
25 Inc.

1 PRE-TRIAL Conferences

2 Lehman Brothers Holdings Inc. v. Barclays Capital, Inc.

3 James W. Giddens, as Trustee for the SIPA Liquidation of Lehman

4 Brothers Inc. v. Barclays Capital Inc.

5 The Official Committee of Unsecured Creditors of Lehman

6 Brothers Holdings Inc. v. Lehman Brothers Holdings Inc.

7 Berenshteyn v. Lehman Brothers Holdings Inc.

8 Lehman Brothers Special Financing, Inc. v. Metropolitan West

9 Asset Management, et al.

10 Lehman Brothers Special Financing, Inc. v. Metropolitan West

11 Asset Management, LLC, et al.

12

13 NOTICE of Hearing on Interim Applications for Allowance of

14 Compensation for Professional Services Rendered and for

15 Reimbursement of Actual and Necessary Expenses

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17 DEBTORS' Motion to Strike William Kuntz's Notice of Appeal of

18 Order Denying Relief Under Federal Rule of Civil Procedure

19 60(b) or, in the Alternative, to Dismiss William Kuntz's Appeal

20

21 MOTION of the Examiner to Compel ABN AMRO Inc. to Respond to

22 Subpoena for Rule 2004 Examination

23

24 Transcribed by: Esther Accardi and Clara Rubin

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Good morning.

3 MR. WAISMAN: Good morning, Your Honor, and Happy New
4 Year.

5 THE COURT: Happy New Year to you, too.

6 MR. WAISMAN: Shai Waisman, Weil Gotshal & Manges on
7 behalf of the Lehman debtors.

8 Your Honor, we filed an agenda letter yesterday
9 afternoon, which was supplemented by an amended agenda letter
10 filed yesterday evening.

11 Notwithstanding that, we do have a request to take at
12 least one matter out of order. And the first matter would be
13 the LBI matter. LBI has only one matter on it's agenda, and
14 that's the uncontested fee application of Hughes Hubbard.
15 Because there's that uncontested matter, we would ask that --
16 LBI would ask that that lead off today's calendar and then get
17 to the regular agenda, if that's okay with Your Honor.

18 THE COURT: That's fine.

19 MR. KOBAK: Thank you, Your Honor. Good morning.
20 James Kobak, Hughes Hubbard & Reed, LLP on behalf of the SIPA
21 Trustee. And thank you to Mr. Waisman and Mr. Krasnow for
22 letting us go out of order.

23 Your Honor, I'll try to be brief, I hope this will be
24 brief. We've submitted our application, this is for the third
25 period for interim compensation. It's a period that runs from

1 June through September of last year, a four-month period. It
2 was quite an active period in the case, with the claims process
3 getting underway as well as a lot of activity on the transfer
4 of accounts. Many other activities with disputes, which I
5 think Your Honor is well aware of. We also spent considerable
6 time starting up our investigation of the debtor, where we
7 worked very closely in coordination with the examiner.

8 The total hours were somewhat over 56,000 hours, of
9 which 600 -- something over 600 were billed by the trustee,
10 himself, and the rest by me and other members of my firm.

11 As Mr. Waisman noted, there's no opposition to this
12 application and SIPC has filed a statement in support. Which
13 as you know, under the statute is entitled at least to
14 considerable reliance.

15 I'll also note for the record, that our fees are
16 subject to a fifteen percent holdback, which in this case
17 amounts to several million dollars for this period.

18 As I think Your Honor knows, we also voluntarily
19 extend a public service discount for this type of work, which
20 is ten percent of our normal billing rates. And that amounts
21 to almost two and a half million dollars.

22 In addition to that, SIPC, as you know, reviews the
23 bills very carefully and we have written off several hundred
24 thousand dollars of time and expenses voluntarily at their
25 request.

1 So if Your Honor likes, I could go through much more
2 detail of what we did, but I think that's all set forth in our
3 application, and I know you have a busy schedule today.

4 THE COURT: There's no need to go through the
5 application on the record, at this point. And I have reviewed
6 the application and the submission from Josephine Wang in
7 support of your application, which included references to
8 various adjustments made in the fees, including one that I
9 found a little obscure relating to something that was an
10 adjustment to your fees that should have been an adjustment to
11 expenses.

12 MR. KOBAK: To expenses.

13 THE COURT: Maybe it was the other way around?

14 MR. KOBAK: No, it was -- we took it out of fees but
15 it was -- I think it was an adjustment to expenses.

16 THE COURT: I think we may be equally confused about
17 what that adjustment was.

18 MR. KOBAK: It wasn't very significant in dollar
19 amount.

20 THE COURT: I think there was an adjustment and I
21 recognize that it was a downward adjustment, and that's fine.
22 I'm pleased to approve the application in the form that it was
23 presented.

24 MR. KOBAK: Thank you, Your Honor, we'll submit an
25 order at the end of the hearing. And if we could indulge you

1 if Mr. Caputo and I could be excused.

2 THE COURT: I think that's wonderful because you'll
3 save fees for the next application.

4 MR. KOBAK: Right. Thank you, Your Honor.

5 MR. WAISMAN: Your Honor, the next three matters on
6 the calendar, we would actually go back to the agenda letter
7 filed last night, and these would be the first three
8 uncontested matters.

9 Shortly before the holidays, Your Honor, on December
10 21st, the debtors were compelled to commence two additional
11 Chapter 11 cases. Those are for two entities; the LB Somerset
12 LLC entity, and the LB Preferred Somerset LLC entity.

13 Your Honor, these two entities, their primary business
14 is membership interest in a joint venture that owns six office
15 buildings in Raleigh, North Carolina. Disputes have arisen
16 between these two members and their joint venture partners, and
17 litigation was instituted -- initiated in the Delaware Chancery
18 Court in December by the joint venture partner against these
19 two Lehman affiliated entities, seeking among other things,
20 really a forfeiture of many of their rights under the
21 membership joint venture agreement.

22 Given limited resources of these two entities, the
23 expense of a litigation and the risk of a forfeiture, these
24 entities really had no choice but to commence these two cases.

25 The three uncontested matters are the joint admin

1 motion, which would seek to jointly administer for
2 administrative purposes only. These two estates, with the rest
3 of the Lehman entities, what we commonly call the all orders
4 motion, which seeks to apply many of the orders that this Court
5 has entered to the other debtors, to these two new cases. And,
6 finally, an extension of time to file schedules and statements.
7 And the extension here would be to February 3, 2010.

8 The debtors are working on preparing those schedules.
9 The holidays and New Year posed a bit of a challenge and that
10 was the reason for the request for the extension. But we do
11 believe the extension would permit us to file the schedules by
12 the period sought.

13 I'm happy to answer any questions Your Honor may have,
14 otherwise we would ask that the relief in those three motions
15 be granted.

16 THE COURT: The relief is granted as to all three
17 motions.

18 MR. WAISMAN: Thank you, Your Honor.

19 Item 4 on the agenda, Your Honor, is the debtors'
20 motion to strike William Kuntz' notice of appeal of the order
21 authorizing Lehman Commercial Paper to purchase Fairpoint
22 Participation.

23 Your Honor entered an order on October 16th permitting
24 the debtors to purchase a participation in a Fairpoint loan.
25 Mr. Kuntz untimely filed a motion to extend the time to appeal.

1 That motion was filed on October 27th, again, untimely, never
2 prosecuted. And a little more -- over a month after that a
3 notice of appeal was filed.

4 The appeal has been assigned to District Judge Barbara
5 Jones. Subsequently, on December 28th, Mr. Kuntz sent a letter
6 to the District Court withdrawing his appeal. The District
7 Court has not acted on that letter, this motion was already
8 filed, already scheduled to be heard today. And given some of
9 the history here the debtors would -- and the fact that the
10 appeal still appears pending on the District Court's docket,
11 would continue to prosecute this motion.

12 If Your Honor would like I'm happy to hand up the
13 submission by Mr. Kuntz to the District Court withdrawing his
14 appeal.

15 THE COURT: I've already seen it. I saw it on the
16 electronic docket.

17 MR. WAISMAN: With that, unless Your Honor has any
18 questions, we would ask the relief be granted.

19 THE COURT: I believe I see Mr. Kuntz in Court, am I
20 right?

21 MR. KUNTZ: That's correct, Your Honor. And the
22 notice was filed with the Bankruptcy Court, not the District
23 Court. So I --

24 THE COURT: All right.

25 MR. KUNTZ: All I can say is that they're spinning

1 their wheels with you.

2 THE COURT: Mr. Kuntz, I don't know if what you've
3 said has been picked up on the record. And I don't know if you
4 want it to be. But it may be just as well for purposes of
5 completion that you come forward, at least --

6 MR. KUNTZ: I have no desire to come forward, Your
7 Honor. The notice was filed in December, the debtors'
8 attorney --

9 THE COURT: Mr. Kuntz, what I'm trying to explain to
10 you --

11 MR. KUNTZ: I understand, Your Honor. The answer is
12 no. You can elaborate all you wish from the bench.

13 MR. WAISMAN: Your Honor, for the record --

14 THE COURT: Just so I'm trying -- I'm just trying to
15 get something established for the record. I have no idea
16 whether or not what Mr. Kuntz said from the gallery, because
17 he's about six rows back, was picked up by the recording
18 equipment. And so my concern has absolutely nothing to do with
19 anything that Mr. Kuntz is presently saying, as much as whether
20 or not it's being recorded. And so this little aside is purely
21 about the integrity of the record at today's proceedings.

22 So my question, Mr. Kuntz, is whether you would like
23 to come forward simply --

24 MR. KUNTZ: Could we put this over to February, Your
25 Honor?

1 THE COURT: No. The question is whether you would
2 like to come forward so that you can be heard. If you don't
3 want to come forward, that's fine, in which case you don't need
4 to say anything. But if you're going to say something in this
5 Court it's going to be recorded as part of the official record,
6 it's not going to be a catcall from the audience.

7 Do you or do you not consent to the striking of your
8 notice of appeal?

9 MR. KUNTZ: Your Honor, I already dismissed the notice
10 of appeal and I have a copy, and it was sent certified mail to
11 the clerk.

12 THE COURT: I don't care what piece of paper you have.
13 Do you or do you not consent --

14 MR. KUNTZ: It's already been dismissed.

15 THE COURT: Do you --

16 MR. KUNTZ: No, I do not consent, because it's already
17 been dismissed as far as I'm concerned.

18 THE COURT: Well, as far as you're concerned is
19 different from what the record reflects.

20 MR. KUNTZ: That's fine, Your Honor. You go ahead and
21 rule any way you wish. I decided after evaluating the
22 situation, I thought the investment was risky. I don't believe
23 the business rule applies for investing estate funds. I
24 thought a prudent man rule or a very prudent man rule should
25 apply.

1 The creditors' committee made no objection and it
2 seemed to me related to my small interest in this estate, it
3 was basically a non-starter.

4 THE COURT: Is it your present intention to withdraw
5 your appeal as it relates to this matter?

6 MR. KUNTZ: Yes.

7 THE COURT: Fine.

8 MR. KUNTZ: Thank you, Your Honor.

9 THE COURT: Thank you very much. The motion to strike
10 is granted, both on the basis of the allegations in the motion
11 and Mr. Kuntz' acknowledgement that he has no intention at this
12 point to prosecute the appeal.

13 MR. WAISMAN: Thank you, Your Honor. I would turn the
14 podium over to Mr. Krasnow.

15 MR. KRASNOW: Good morning, Your Honor. Richard
16 Krasnow, Weil Gotshal & Manges on behalf of the Chapter 11
17 debtors.

18 Your Honor, the next item on the uncontested portion
19 of the calendar is the debtors' motion for authorization and
20 approval of a settlement agreement which does go beyond mere
21 settlement of disputes with the insolvency administrator of
22 Lehman Brothers Bankhaus AG, that is a Lehman Bank which is an
23 insolvency proceeding in Germany.

24 Your Honor, there is a companion motion that was filed
25 by the administrator in connection with its -- or his pending

1 Chapter 15 case, which is before this Court. And with the
2 Court's permission I would suggest that following our
3 presentation with respect to the debtors' motion, it might make
4 sense to take that item, which is number 13 on the agenda,
5 immediately following. They are parallel proceedings.

6 THE COURT: It seems to me that we should here them in
7 tandem.

8 MR. KRASNOW: Very well, Your Honor.

9 Your Honor, the motion currently before the Court in
10 the Chapter 11 cases is probably -- would probably be viewed in
11 an ordinary Chapter 11 case as somewhat extraordinary. And
12 it's probably even unusual in the context of this extraordinary
13 Chapter 11 case that is currently before the Court in the form
14 of Lehman Brothers.

15 What this agreement contemplates and provides for is,
16 both resolutions of disputes with respect to certain loans, as
17 well as the acquisition of certain loans. All of which would
18 be reflected in a transaction pursuant to which the Lehman
19 parties, which would include two Chapter 11 debtors; LBHI and
20 LCPI, paying to the administrator on a net-net basis, that is
21 after taking into account cash that is supposed to move back
22 and force, but netting that, if you will, from the purchase
23 price. A payment to the administrator of approximately one
24 billion dollars, and the receipt by the Lehman parties, which
25 include those two Chapter 11 debtors and a non-debtor; Lehman

1 non-debtor, Lehman ALI, that's A-L-I, of commercial loans and
2 real estate loans which have an aggregate outstanding principal
3 balance of in excess of three billion dollars and which have a
4 value, in our view, of in excess of two billion dollars. Large
5 sums, Your Honor, that's why I characterize this as somewhat
6 extraordinary. But what is interesting, Your Honor, is as one
7 looks through the docket there are no objections to this
8 transaction.

9 There was one formal objection that was, indeed,
10 filed, I would style that objection as one really asking for
11 information, which was supplied and which resulted in that
12 objection being withdrawn. There was an informal inquiry made
13 by a party which did not culminate in an objection, but rather
14 in a revision to the proposed order, which reflects that if
15 Your Honor were to approve these transactions it would be
16 without prejudice to their interests, and two other documents
17 which were filed; one by the creditors' committee and one
18 yesterday by the ad hoc committee, both of which support this
19 transaction -- or these transactions.

20 Your Honor, in light of the fact that there are no
21 objections, but, nonetheless, at least in our view, and we
22 assume the Court's view, that given the size of these
23 transactions perhaps there ought to be more of a record than
24 simply the filing of an application. In lieu of my summarizing
25 the motion, and the events, and the agreement, what I would

1 propose, with the Court's permission, is to make a proffer of
2 the testimony of the Mr. Daniel Ehrman. Mr. Ehrman is in Court
3 today. Mr. Ehrman is a managing director at Alvarez & Marsal.
4 He's also an officer of various of the Chapter 11 debtors. And
5 he was, in fact, the lead negotiator with the administrator,
6 Dr. Frege, who I believe is also in the courtroom, in
7 connection with his application for approval of this
8 transaction in the Chapter 15 case. And I would offer his
9 proffer in lieu of my summary in support of the motion, if
10 that's acceptable, Your Honor.

11 THE COURT: That's perfectly acceptable.

12 MR. KRASNOW: Your Honor, pursuant to Rule 102 of the
13 Federal Rules of Evidence, I offer as a proffer the testimony
14 that would be given by Mr. Daniel Ehrman, a managing director
15 of Alvarez & Marsal. As I noted, Your Honor, Mr. Ehrman is in
16 Court today and he's available for cross-examination.

17 Your Honor, if called to testify, Mr. Ehrman would
18 testify as follows:

19 Mr. Ehrman would testify that he is a managing
20 director with Alvarez & Marsal, or A&M. And was assigned to
21 the Lehman matter in September of 2008. His primary areas of
22 responsibilities include managing all international and foreign
23 matters of the debtors, and, also, managing and overseeing the
24 debtors' derivative transactions.

25 Mr. Ehrman began his professional career as an

1 attorney practicing law in France for five years. He has
2 specialized in turnaround and restructurings with A&M for more
3 than eight years, serving in a variety of interim management
4 advisory and financial restructuring roles.

5 On behalf of the Lehman debtors Mr. Ehrman led the
6 negotiations with the administrator that resulted in the
7 settlement agreement that is the subject of today's hearing. A
8 copy of which agreement is attached to the debtors' motion.

9 Prior to its filing he also reviewed and approved the
10 debtors' motion seeking approval of the agreement, and the
11 settlement and the transactions provided for in the agreement,
12 and adopts the representations contained in the motion.

13 Mr. Ehrman would testify that he first became involved
14 with Bankhaus soon after the commencement of these Chapter 11
15 cases, participating in discussions through the months of
16 October and November of 2008 with respect to a potential
17 transaction, that if successful might have avoided the Bankhaus
18 insolvency proceedings. In those discussions he became
19 familiar with various of Bankhaus assets and in particular with
20 the loans on Bankhaus' books that had been the subject of
21 participation with other Lehman entities.

22 While a Bankhaus insolvency could not be avoided, Mr.
23 Ehrman continued to focus on the loans, and in particular, on a
24 category of loans referred to in the motion and the agreement
25 as category 1 loans. In light of the intercompany claims that

1 the debtors and Bankhaus have against each other and the
2 relationships between the debtors and Bankhaus with respect to
3 the participated loans.

4 Mr. Ehrman would testify that the participations
5 generally appear in two forms. As to both forms, the
6 participations are structured with a named stated lender who
7 participates out all or a portion of the loan to a third-party.
8 One form of participation is generally referred to, at least at
9 Lehman, as U.S.-style, while the other form is generally
10 referred to as U.K.-style.

11 Generally and U.K.-style participation, the named
12 stated lender, has a legal and beneficial interest in the loan,
13 itself. The participant, therefore, has a debtor/creditor
14 relationship with the named lender as to any claims that it has
15 for monies received by the lender from the borrower.

16 In a U.S.-style participation, on the other hand, the
17 named lender is really only a nominal lender and beneficial
18 rights lie with the participant.

19 Mr. Ehrman would testify that it is his understanding
20 that the named lender in the case of U.S.-style participations
21 has only bear legal title and that the essential difference
22 between the two forms of participations, is that the risks,
23 exposure and liability with respect to the loans in a U.S.-
24 style participation are borne by the participation. Where
25 under a U.K.-style participation, it is the named lender that

1 bears the risk associated with and thus has the ownership of
2 the participated loans.

3 Mr. Ehrman would testify that it is his understanding
4 that although the category loans have many characteristics
5 associated with the U.S.-style of participations, they arguably
6 could be characterized as U.K.-style participations. In which
7 case all ownership rights would reside with the named Lehman
8 lender.

9 He understands, that among other reasons, this is
10 because on or about August 15, 2002, LBHI and Bankhaus entered
11 into a security and collaborative agreement that generally
12 required LBHI to make payments to Bankhaus to the extent that
13 Bankhaus had to write down or mark down asset fields of values
14 including loans.

15 He further understands that to the extent that the
16 security and collateral agreement could be viewed as a
17 guarantee, it would shift the risks associated with the loans
18 to LBHI, which arguably could result in the recharacterization
19 and/or treatment of the category loans as U.K.-style and not
20 U.S.-style participations, such that the debtors and other
21 lenders would have all entitlements with respect to those
22 loans. And Bankhaus would have only an unsecured claim against
23 the debtors and other lenders for the amount due it under the
24 participations.

25 The category 1 loan participations, therefore,

1 presented litigable issues concerning the true ownership of
2 those loans, and thus, an opportunity for the debtors to engage
3 in discussions with the administrator regarding the ownership
4 of these loans. While there were some discussions with
5 Bankhaus' insolvency administrator, they're in the first four
6 to five months of 2001 regarding the category 1 loan
7 participations. It was in or about June 2009 that substantive
8 discussions began regarding a potential resolution of the
9 status of these loans. These discussions also expanded to
10 include discussions regarding other participated loans where
11 Bankhaus was the stated lender. These more substantive
12 discussions extended from June or July of 2009 until almost the
13 date prior to the execution of the agreement.

14 Mr. Ehrman would testify that the parties concluded
15 that the best way to resolve the uncertainty over the ownership
16 of category 1 loans, was for the Lehman parties to acquire the
17 category 1 loans, of which there are approximately eighty-six
18 with a total outstanding balance due of approximately 2.9
19 billion. For an appropriate purchase price that would account
20 for the litigation risks attendant to resolving the dispute and
21 the commercial risk attended to collection of the amounts due
22 under the loans. The parties agreed on what is referred to in
23 the agreement as an applicable value that refers to the status
24 of the loans, the anticipated collections on the loans, the
25 present value of payments to be made on the loans. Some might

1 say market value, I'm not sure it's reflective of market value,
2 Your Honor, but the value.

3 Mr. Ehrman would testify that the valuation of the
4 real estate loans was undertaken by Lehman's real estate team,
5 that it's managing Lehman's real estate portfolio and entailed
6 a loan-by-loan review that included cash flow analysis and
7 present value discounting.

8 Commercial loan values were developed by Lehman's
9 commercial loan team that is managing Lehman's commercial loans
10 and entailed an evaluation of market trading values associated
11 with these loans. These values were reviewed by and agreed to
12 by the administrator and Lehman.

13 A discount of these values was then negotiated at
14 sixty percent of applicable value, or a forty percent discount
15 and the agreed purchase price with respect to the category 1
16 loans.

17 Mr. Ehrman would testify that during the negotiations
18 and as part of the overall resolution between the debtors and
19 the administrator, the administrator indicated that he also
20 wanted to include Lehman's acquisition of what is referred to
21 in the agreement and the motion as category 2 and category 4
22 loans where Bankhaus is the named lender.

23 Notwithstanding the fact that these loans are not
24 subject to any litigation issues, the inclusion of the category
25 2 loans of which there are approximately five, which have or

1 had total outstanding principal amounts due of approximately
2 eighty-seven million dollars, and the category four loans of
3 which there are approximately twenty-four with a total
4 outstanding principal balance due of approximately 481 million
5 dollars represented a potential pure acquisition, which Mr.
6 Ehrman would testify, the debtors concluded would be
7 appropriate if they were appropriate discounts, since it would
8 afford to the estates an opportunity to realize significant and
9 substantial value.

10 In that regard Mr. Ehrman would testify that the
11 agreement provides that there is an agreed applicable amount as
12 with the category 1 loans, and purchase price of essentially as
13 to the category 4 loans, eighty percent of that value, or a
14 discount of twenty percent. The formula with respect to the
15 category 2 loans is characterized somewhat differently but
16 essentially results in the same formulation.

17 Mr. Ehrman would testify that the difference between
18 the discount factors of the category 1 and 4 loans, a forty
19 percent versus twenty percent, is attributable to the
20 litigation risk relating to the category 1 loans that don't
21 exist with respect to the category 4 loans.

22 Mr. Ehrman would further testify that there are
23 various other material terms and conditions of the agreement
24 relating to, among other things, indemnities, releases and
25 agreements as to certain claim amounts. Based upon his review

1 of the agreement and the motion, he believes that those
2 material terms and conditions are accurately summarized in the
3 motion.

4 Mr. Ehrman would note that the agreement upon amounts
5 of the Bankhaus claims, that I've alluded to, against certain
6 of the Chapter 11 debtors, relate to category 3 loans. Which
7 are loans where a Lehman party has all of the ownership rights
8 with respect to the loans and Bankhaus only has unsecured
9 claims against the named lender for amounts due to it as a
10 participant. And unsecured claims against LBHI under the
11 security and collateral agreement.

12 Under the settlement agreement the administrator is to
13 be granted a non-priority general unsecured claim against LCPI
14 in the amount of approximately one billion dollars, which is an
15 amount net of certain amounts owed to LCPI with respect to
16 certain category 2 and category 4 loans.

17 The administrator will also be granted a non-priority
18 general unsecured claim against LBHI under the security and
19 collateral agreement relating to the category 3 loans and one
20 other loan in the gross amount of approximately 1.38 billion
21 dollars less any distributions that he receives with respect to
22 the allowed claim against LCPI.

23 Mr. Ehrman would note that his testimony regarding the
24 terms of the agreement represents a summary of those terms, and
25 that to the extent there's any inadvertent inconsistency with

1 the summary and the terms of the agreement, it is the agreement
2 that controls.

3 Mr. Ehrman would testify that subsequent to the
4 execution of the agreement, the agreement was modified or
5 amended by a consent document dated December 18, 2008 and a
6 letter agreement dated January 8, 2009, both of which were
7 filed with the Court on January 8, 2009.

8 Mr. Ehrman would further testify --

9 THE COURT: I think you mean 2010.

10 MR. KRASNOW: I'm sorry, Your Honor.

11 Mr. Ehrman would correct his testimony and note it was
12 2010.

13 Mr. Ehrman would further testify that he understands
14 that both of these documents were reviewed by the creditors'
15 committee and they have no objection to them. He understands
16 that both documents take into account the fact that significant
17 principal payments were made on the affected loans, the loans
18 referred to in those documents. And with respect to certain
19 category 2 loans, full principal payments were made by
20 borrowers which are to be acquired by the relevant Lehman
21 party. Both the Lehman parties and the Bankhaus administrator
22 determined that these circumstances warranted modifications to
23 the agreements such that as to one loan the purchase price to
24 be paid would be reduced, and as to others, the amount of cash
25 to be received by the Lehman parties would be increased.

1 In sum, Your Honor, these amendments are favorable to
2 the debtors and the other Lehman parties.

3 If the motion is granted the Lehman parties will make
4 a net payment to the administrator of approximately 1.388
5 billion dollars. Again, Your Honor, that's a gross number, if
6 you will.

7 If a closing as to all the loans takes place, this
8 amount which is subject to adjustments as provided for in the
9 agreement includes payment for cash held by the administrator
10 that will be transferred to or retained by the Lehman parties
11 such that if this account is accounted for the net-net payment
12 to the administrator will approximately be one billion dollars.
13 Again, subject to adjustments.

14 Payments for loan in cash will be made with respect to
15 loans that have an aggregate applicable value of approximately
16 2. billion dollars inclusive of approximate 442 million dollars
17 of cash. Using October and November numbers to the cash
18 collections as of that, all of which would be transferred to
19 the appropriate Lehman parties.

20 Mr. Ehrman would testify while there -- there can be
21 no certainty as to the actual amounts that will be realized on
22 these loans, the debtors believe that based on their analysis
23 and their business judgment, it is reasonable to anticipate
24 that the Lehman parties will recover substantial amounts,
25 significantly in excess of the purchase price.

1 Mr. Ehrman would note that the motion does include an
2 illustrative example of an allocation of the purchase price
3 amongst the three Lehman parties. That would be, Your Honor,
4 LBHI paying a purchase price of approximately 158 million
5 dollars. LCPI paying a purchase price of approximately 1.2
6 billion dollars. And Lehman ALI paying a purchase price of
7 approximately 48.4 million dollars. However, the allocation of
8 certain loans have not been finalized particularly as between
9 LCPI and LBHI and, therefore, there could be adjustments as to
10 which of those entities would actually own certain loans and,
11 therefore, which of those entities will be paying the purchase
12 price applicable to those loans.

13 Mr. Ehrman would testify that based on discussions
14 with the debtors' counsel it his understanding that many of the
15 litigation issues and claims that would be made concerning the
16 nature of the category 1 loan participations are somewhat novel
17 in nature and the results are highly uncertain. To a
18 significant extent, the debtors' success in litigating with
19 respect to the categorization of the category 1 line
20 participations would turn on determinations that the security
21 and collateral agreement with LBHI was a guarantee and that
22 those Lehman parties, other than LBHI who are the named lenders
23 under certain loans were, themselves, deemed to be at risk with
24 respect to the loans, that they had participated to Bankhaus
25 even though they aren't parties to the security and collateral

1 agreement, which naturally could raise potential mutuality
2 issues.

3 Mr. Ehrman would testify that it is clear that these
4 issues would be highly contested and the results of any
5 litigation would be far from certain. The only certainty being
6 protracted litigation at great costs and with risks that while
7 the parties were fighting about who owned the loans, no one
8 would be devoting the necessary resources to managing the loans
9 and maximizing their value.

10 Mr. Ehrman would testify that it his view that the
11 forty percent discount against applicable value of category 1
12 loans more than adequately takes these risks into account and
13 is more than reasonable.

14 Mr. Ehrman would also testify that the debtors believe
15 that their decision to acquire all of the loans covered by the
16 agreement, taking into account the potential significant total
17 recoveries that they might realize on these loans even given
18 the collection risks inherent in any loan at the discounts
19 provided for in the agreement, represents an exercise of
20 prudent business judgment. In that regard Mr. Ehrman would
21 note that no creditors have challenged the debtors' business
22 judgment, and the creditors' committee, which was kept abreast
23 of the negotiations and undertook its own analysis of the
24 transactions, supports the debtors' motion.

25 In conclusion, Mr. Ehrman would testify that in light

1 of all of this, the debtors believe that the agreement is in
2 the best interest of their estates and creditors and should be
3 approved.

4 Your Honor, that would conclude Mr. Ehrman's proffer.

5 THE COURT: Is there any party who would wish to
6 cross-examine Mr. Ehrman with respect to the proffer? I hear no
7 such request I accept the proffer as the functional equivalent
8 of live testimony by Mr. Ehrman who is in Court.

9 MR. KRASNOW: Thank you, Your Honor. Your Honor,
10 based upon the proffer, the motion -- the amendments to the
11 agreement that have been filed with the Court, the statements
12 in support, we would respectfully request that the Court
13 approve the motion, approve the settlement agreement and all of
14 the transactions contemplated by that agreement.

15 THE COURT: All right. I note that there are
16 statements that have been made by, both the creditors'
17 committee and the ad hoc group of creditors in support of this.
18 I'll just ask whether there's any desire for comment before I
19 rule with respect to the motion? Apparently not.

20 I've read the motion and I appreciate being informed
21 further by means of the offer of proof of Mr. Ehrman's
22 testimony concerning the business judgment, which underlies the
23 transaction which has been characterized by counsel as unusual
24 and which I view as unusual myself, independently.

25 One of the more unusual aspects of the transaction is

1 that it involves a very significant acquisition of financial
2 assets as a means to, both resolve litigation risk and to
3 potentially realize gain. In light of the fact that the
4 creditor constituencies that have observed this and who have
5 studied it support the transaction and in light of the fact
6 that Mr. Ehrman of Alvarez & Marsal has dedicated significant
7 personal time and attention to analyzing the risks and rewards
8 of the transaction, I'm satisfied that this represents a
9 prudent exercise of the debtors' business judgment. And
10 significantly reduces litigation risk.

11 Under the circumstances, I'm pleased to approve the
12 motion as presented.

13 MR. KRASNOW: Thank you, Your Honor. Your Honor, we
14 had filed with the Court, I believe yesterday, a blackline of a
15 revised form of order which took into account, among other
16 things, the resolution of some issues that had been raised by a
17 party who had not filed an objection, that just without
18 prejudice language. That revised proposed order was reviewed
19 by the administrators counsel and the committee and they have
20 no objection.

21 Subsequent to that, in reviewing the order, we caught
22 a typo. The decretal paragraph in question we think clearly
23 authorizes the debtors to proceed with the transaction, but
24 there was a word missing "authorize" and so the order has been
25 further revised. That has been reviewed by, both the committee

1 and the administrator, and we would propose, Your Honor, at the
2 conclusion of today's hearings to provide that with the Court.

3 THE COURT: Fine.

4 MR. KRASNOW: I think, Your Honor, at this point it's
5 probably appropriate to turn over the rostrum to the
6 administrator's counsel.

7 THE COURT: Very well.

8 MR. YATES: Good morning, Your Honor. Farrington
9 Yates with Sonnenschein on behalf of Dr. Michael C. Frege, the
10 insolvency administrator for Lehman Brothers Bankhaus AG, and
11 insolvents.

12 And as Mr. Krasnow noted we had also filed in our
13 Chapter 15 proceeding a parallel motion to approve the
14 settlement agreement as some of the assets that were included
15 and affected by the settlement agreement were located within
16 the territory of the United States.

17 I have with me Mr. Frege.

18 DR. FREGE: Good morning.

19 MR. YATES: As by way of background, Your Honor, as
20 the Court may recall, on April 29th Dr. Frege filed the
21 petition for recognition under Chapter 15 with this Court. And
22 on May 22, 2009 the Court entered the order granting
23 recognition to Dr. Frege as the foreign representative. And
24 also recognizing the Bankhaus insolvency proceedings in Germany
25 as a foreign-named proceeding. And with respect to that

1 particular recognition order, so far we were able to work
2 through a number of issues with respect to administering the
3 estate. And that -- one of them is the settlement agreement
4 and that's one of the reasons why we're here.

5 Our parallel motion is to seek approval of the
6 settlement under Section 363 of the Bankruptcy Code as
7 incorporated by Sections 1520 of the Bankruptcy Code, as I
8 said, because the settlement involves U.S. assets of Bankhaus.

9 With respect to the motion in the Chapter 15
10 proceeding, we provided notice to all of the parties that were
11 to be given notice in the Chapter 15 proceeding. We refer to
12 that as the notice parties. And also because of the notice
13 that was given in the LBHI case, generally, we believe that any
14 party that has any interest in being heard today has had the
15 opportunity to understand the motion and the impact. And in
16 the Chapter 15 proceeding, as Mr. Krasnow had mentioned in the
17 LBHI proceeding, no objections have been filed.

18 The motion essentially requests approval of the
19 settlement from the Bankhaus perspective. And in that light,
20 Mr. Frege believes that the settlement -- I'm sorry, Dr. Frege
21 believes that the settlement demonstrates an exercise of his
22 sound business judgment as the insolvency administrator of the
23 Bankhaus estate. And that the settlement is in the best
24 interest of the creditors of the Bankhaus estate, is fair and
25 equitable and is within a range of litigated outcomes in the

1 event that, in fact, the issues were litigated.

2 As Mr. Krasnow spent some time and also with the
3 proffer of Mr. Ehrman's testimony, outlining the settlement
4 terms and conditions, I won't belabor the points or try to get
5 through and summarize them again, so that we won't waste time.

6 Dr. Frege was involved personally in the negotiations
7 with respect to this settlement agreement. And settlement
8 negotiations were extensive and they were at arms length, and
9 this agreement was heavily negotiated.

10 However, notwithstanding that there were extensive
11 negotiations, he does believe that the settlement discharges
12 his duty as an insolvency administrator for the German estate
13 to liquidate assets in a commercially reasonable way. And that
14 is essentially the standard by which he has held in Germany.

15 Now, in the exercise of his judgment and with respect
16 to entering into the settlement agreement, he also evaluated
17 the litigation risks. And as Mr. Krasnow described to the
18 Court, there is significant risk with respect to the
19 characterization of these loans and participation interest.
20 And the issues were novel, and, again, if there was litigation
21 it would be protracted and costly.

22 And so in light of the dispute on the merits and in
23 light of the timing, as far as how long it might take in order
24 to resolve these issues, Dr. Frege evaluated these points among
25 others in deciding to enter into the settlement agreement.

1 As Mr. Krasnow had referenced, the length of time with
2 respect to litigation who would administer the assets during
3 the dispute, that was also an issue. Also the value of the
4 assets might change over a period of time. And, also, there
5 was a potential for exchange rate and currency risks from the
6 German perspective. And, so, with respect to the settlement
7 the benefits to the Bankhaus estate include the following:

8 Essentially it yields now money and it monetizes
9 assets so that Dr. Frege can then take the money and make
10 distributions to creditors in Germany. Because there is -- the
11 assets are being monetized now as opposed to sometime in the
12 future, there is also time value to having the money delivered
13 to the estate now as opposed to ten years from now at the end
14 of any sort of protracted litigation.

15 The Lehman parties will take these assets. And so
16 they will take on the risk of these assets. As far as the
17 valuation going up and down, whether they can be administered,
18 if there's going to be any collection risks, et cetera. And so
19 from the Bankhaus perspective that was a positive to entering
20 into this agreement, it transfer the risk of ownership to the
21 Lehman parties.

22 As Mr. Krasnow also mentioned, Bankhaus receives
23 substantial allowed general unsecured claims against certain
24 Lehman entities. And, again, as opposed to litigating those
25 issues with respect to guarantee, whether they're not

1 guarantee, whether the security and collateral agreement has
2 the effect that Mr. Krasnow suggested, these are all issues
3 that could be litigated but they're resolved pursuant to the
4 settlement agreement.

5 So, overall, we believe and Dr. Frege agrees, that
6 this settlement agreement is also in the best interest of the
7 Bankhaus creditors.

8 With respect to creditor approval, there's a creditors
9 assembly in Germany and a creditors' committee, which is a
10 smaller subset. Both have vetted this settlement agreement,
11 and both have approved it. Now, as Mr. Krasnow mentioned with
12 this last minute letter agreement and consent that was filed
13 earlier in the week, Dr. Frege needs to go back to the creditor
14 committee, he will do so after this hearing. And assuming that
15 the motion is approved confirm with them and then proceed to
16 closing. And all of this is provided for in the agreement. So
17 from his perspective as far as the overall construct of the
18 settlement agreement, et cetera, it's been approved by
19 creditors in Germany. And under German law there's no German
20 court that has to approve this settlement, it's really only
21 done in material matters, the administrator is instructed to
22 consult with creditors; the credit assembly and the creditor
23 committee, before taking material lapse, and as I've mentioned
24 he is about to.

25 I also have a proffer of Dr. Frege.

1 THE COURT: It sounds as if you've already given it.

2 MR. YATES: Well, if you want for me to proceed that
3 way we can certainly do so.

4 THE COURT: No, it's fine, I'm happy to hear your
5 proffer. But note that I've already heard quite a lot about
6 what I assume will be the substance of the proffer by virtue of
7 the presentation you've already made.

8 MR. YATES: I think you're right, Your Honor.

9 I'll proffer as follows:

10 This proffer will serve as the testimony of Dr. Frege.
11 If he were to take the stand and to testify, he is present here
12 in the courtroom, and if so, taking the stand would testify as
13 follows:

14 I am Michael C. Frege. I am the court appointed
15 insolvency administrator for Lehman Brothers Bankhaus AG, which
16 is In Insolvenz proceedings in Germany.

17 I've been an insolvency administrator for over twenty
18 years. I have a degree in law and also a doctoral degree,
19 hence Dr. Frege.

20 He is a member of a number of professional
21 organizations in Germany with respect to insolvency and also
22 has a number of certifications as an insolvency practitioner in
23 Germany.

24 He is a published author and has published the leading
25 treatise on German insolvency law and practice, and he is also

1 a mediator.

2 He has been involved in over 800 insolvency
3 proceedings in German.

4 Under German insolvency law the insolvency proceeding
5 in which Bankhaus is subject the purpose of it is to liquidate
6 assets. And German authority permits and authorizes the
7 insolvency administrator to liquidate assets in the best
8 commercial way and within the exercise of his discretion.

9 I am very familiar with the settlement agreement. I
10 directed the negotiations from the Bankhaus side and was
11 personally involved. I've heard the description of the
12 settlement agreement from Mr. Ehrman and would concur with his
13 description.

14 And I would, in my view, the settlement agreement as
15 described previously impacts U.S. assets of Bankhaus located
16 here, within the territory of the United States.

17 And the settlement agreement was negotiated
18 extensively and over an extended period of time.

19 In my view, the settlement is in the best interest of
20 the Bankhaus estate. The dispute involving the litigation
21 risks described with respect to loans versus participation and
22 in characterization and the owners of each presented a risk
23 that would be litigated if not settled. If litigated in my
24 view the litigation would be protracted and costly. During
25 that time, because neither party would have ownership, per se,

1 to these assets, neither party; the Lehman parties nor
2 Bankhaus, would be administering those assets.

3 The settlement agreement offers an opportunity to
4 monetize these assets now, which is consistent with my mandate
5 under German law. The result yields settlement -- yields
6 certainty and it also yields immediate cash. That immediate
7 cash has a value now as opposed to over time in the event that
8 we were ultimately successful at some point in the future. The
9 Lehman parties will also take risk of ownership of these assets
10 going forward, and in that way they will also bear the risk of
11 changing market values for the loans or participations. If
12 there is any sort of exchange rate volatility they will also
13 take on that risk. And I intend to take this money and make a
14 distribution to creditors hopefully in the spring.

15 Moreover, Bankhaus as part of the settlement, receives
16 substantial allowed claims against the Lehman parties' estate.
17 I have discussed these matters and the settlement agreement
18 with the creditors assembly. It has vetted and approved this
19 agreement. I've also met on a number of occasions with the
20 creditors' committee, in at least seven meetings, and have also
21 vetted the settlement agreement. Both have approved this
22 settlement agreement and both have authorized Dr. Frege,
23 myself, to execute and sign the agreement.

24 In light of the settlement -- I'm sorry, the
25 settlement letter that was just supplemented, I intend to meet

1 with the creditors' committee next week to advise them of these
2 proceedings and the conclusion, and then move to closing as
3 provided for in the agreement. And under German law there's no
4 requirement for a court authority in Germany to enter into this
5 agreement.

6 So, in conclusion, entering into the settlement
7 agreement, in my view, reflects a demonstration of sound
8 business judgment as an insolvency administrator under the
9 circumstances. I believe that discretion is sound and it's
10 within my authority as an insolvency administrator for
11 Bankhaus.

12 It is also in my view, the settlement agreement is
13 fair and equitable and in the best interest of creditors of the
14 Bankhaus bankruptcy estate.

15 That would be Dr. Frege's testimony if called.

16 THE COURT: Is there any party who objects to my
17 receipt of the offer of Dr. Frege's testimony by means of his
18 counsel's proffer? There's no objection and I accept the
19 proffer.

20 MR. YATES: Thank you, Your Honor. With that, we
21 would also then move for approval of the settlement agreement
22 in the Chapter 15 proceedings. And for the Court's
23 information, the way that we have structured the order is that
24 we make relevant findings with respect to the Chapter 15
25 process, filing service, et cetera. But then essentially we

1 incorporate by attaching the order that would be entered with
2 respect to the LBHI proceedings. And in that way we retain
3 consistency between both documents. So our order is going to
4 be, you know, considerably less voluminous, but, essentially,
5 it will incorporate it by reference as if attached.

6 THE COURT: It's your Chapter 15 case. And if that's
7 what you want, that's fine.

8 MR. YATES: All right. Thank you, Your Honor.

9 THE COURT: I'm prepared to enter the order in the
10 form that it has just been described in the Chapter 15 case.
11 This now becomes I think the longest uncontested matter in the
12 history of the Lehman bankruptcy. And appears to represent one
13 of those unusual win-win circumstances in which parties on both
14 sides of the litigation risk recognize that there are mutual
15 advantages to an early settlement and a businesslike settlement
16 as opposed to a litigated outcome. I think for that reason
17 it's worth the time, and I also think it's a good example for
18 others to emulate.

19 I assumed by virtue of the proffer just made of Dr.
20 Frege's testimony that the ability to monetize assets and to do
21 so promptly represented a significant reason that supported the
22 business judgment of Dr. Frege because the insolvency regime in
23 Germany is focused on liquidation in a commercially reasonable
24 manner.

25 To the extent that it is helpful to his process for me

1 to confirm that I believe that what has been represented
2 constitutes a commercially reasonable liquidation, I so order
3 the record.

4 Now, is there anything more for this?

5 MR. YATES: Your Honor, I have a proposed order.

6 THE COURT: You can -- why don't you just give that to
7 Mr. Krasnow to --

8 MR. YATES: Sure.

9 THE COURT: -- hand up when he hands up everything
10 else at the end of today's --

11 MR. YATES: Thank you, Your Honor.

12 THE COURT: Fine. And if you wish to be excused, you
13 may be excused.

14 MR. YATES: Thank you.

15 THE COURT: And if you wish to stay you're perfectly
16 welcome to stay.

17 MR. KRASNOW: Your Honor, before we get to the next
18 item, in that regard, just to advise the Court Mr. Ehrman does
19 need to leave. Among other reasons, we are holding the third
20 global protocol meeting this time in New York, and his
21 attendance is required and mine will be. But if those who need
22 to attend that meeting may be excused and we can then proceed
23 to what is the contested section of the calendar.

24 THE COURT: That's fine. I'm just going to make the
25 suggestion that at the next omnibus hearing in February that

1 there be a brief status report as to the progress, if any, made
2 at this most recent meeting of the parties pursuant to the
3 protocol.

4 MR. KRASNOW: I'm sorry, Your Honor. We would intend
5 to do so.

6 THE COURT: Great.

7 MR. KRASNOW: Your Honor, the next matter on the
8 calendar which is the contested portion may be shorter than the
9 uncontested portion, is item number 6. It is the motion of
10 Merrill Lynch International for relief from the automatic stay.

11 Your Honor, this is styled as a status conference. At
12 the omnibus hearing Your Honor heard arguments with respect to
13 that particular matter. And before we get to the substance of
14 that I'd like to make an application to the Court.

15 There was much discussion, Your Honor, with respect --
16 at the last hearing about the request that Merrill had been
17 making -- was making, the potential implications, if any, that
18 it might have with respect to a whole series of similar notes
19 that had been issued by the Lehman Dutch entity referred to as
20 LBT. And Your Honor heard from counsel representing the Dutch
21 trustees in that regard, who I believe is in the courtroom now.

22 THE COURT: Yes, he is.

23 MR. KRASNOW: While we certainly have firm views which
24 were expressed at that last hearing with respect to this
25 motion, subsequent to the matter being heard then we thought

1 that what might make the most sense, is rather than dealing
2 with this acceleration, automatic stay issue, in the context of
3 the Merrill Lynch motion, that we be afforded an opportunity,
4 particularly given that we have the global protocol meetings
5 this week, and plan on having separate meetings on this issue
6 among others with the Dutch trustee and his respective Dutch
7 and U.S. counsel if this matter were adjourned to February, to
8 see whether or not as a result of those discussions there was a
9 more global approach, if you will, that could be taken with
10 respect to the acceleration, automatic stay issue. We made
11 that request of Merrill, they're not prepared to adjourn this
12 matter, and so I make this application to the Court, if you
13 will, for the Court to consider an adjournment of this hearing
14 to the February hearing to afford us an opportunity to have the
15 kinds of discussions I've just described with the Dutch
16 trustee. And depending upon what the outcome of that may be,
17 obviously, then with Merrill, rather than proceeding to deal
18 with the automatic stay issue, albeit, it's limited to Merrill,
19 but could have broader implications. Again, rather than
20 pursuing the merits of that today. So that is our request.

21 THE COURT: All right. Does Merrill oppose that
22 request?

23 MR. KRASNOW: Yes, they do, Your Honor.

24 THE COURT: Okay. I guess I'll hear the reason why.

25 MR. ZIMMERMAN: Good morning, Your Honor. George

1 Zimmerman of Skadden Arps on behalf of Merrill Lynch
2 International and certain of its affiliates.

3 We do oppose the motion for adjournment. And if I can
4 just --

5 THE COURT: Let's just say that you were to prevail
6 what would I do with this today? I expected the parties to
7 have worked out, consistent with comments that I made from the
8 bench, a stipulation which would be presumably entered as an
9 agreed order. If not, you run the risk of losing, don't you?

10 MR. ZIMMERMAN: Yes. And that's just --

11 THE COURT: Is that what you want to have happen?

12 MR. ZIMMERMAN: No.

13 THE COURT: Okay. So why do you oppose this --

14 MR. ZIMMERMAN: Two reasons. We did pursuant to your
15 instructions submit a proposed order that was very simple,
16 because you had dictated what you thought the parameters should
17 be last time.

18 THE COURT: It wasn't exactly dictated as much as
19 musings from the bench.

20 MR. ZIMMERMAN: No, fair enough. Musings from the
21 bench. That basically, forget the words for a second, would
22 say that Merrill Lynch has the ability to serve its notice of
23 acceleration on LBHI, with no deleterious impact whatsoever on
24 LBHI, and reserving all parties' rights to do whatever -- to
25 argue whatever they want if and when we have to come before

1 you. And it would be without prejudice to everybody's rights.

2 We submitted it -- now, we submitted the draft
3 language to LBHI. We then asked for comments followed-up and
4 they said they'd like an adjournment to discuss a global
5 protocol with the LBD trustee. We have no problem, we know you
6 are very respectful of global protocols, as are we. Merrill
7 Lynch has no objection to them having whatever discussions they
8 want. They've had two months to try to start that, they can
9 take as much time as they want. Nothing about the proposed
10 order, which I'll get to in a minute, would impact in any way
11 their ability to have those discussions. However, an
12 adjournment has two adverse effects on Merrill Lynch.

13 And you will recall, Your Honor, that a lot of the
14 other noteholders of LBT have already, without coming to this
15 Court, served their notices of acceleration. As a result of
16 that in the LBT the trustee has issued some guidelines as to
17 how they may or may not value the claims. I don't know that
18 there -- I'm not constraining the trustee in any way. He's
19 free to calculate any way he wants he can change. But based on
20 his current guidelines and without prejudicing our rights, let
21 me just put it this way. There is a risk that because Merrill
22 Lynch has not -- has come to Your Honor in respect to you
23 prerogatives of this Court before serving a notice of
24 acceleration, the claim of Merrill Lynch continues to diminish
25 because it hasn't accelerated in LBT. It's continuing to be

1 discounted. All the other noteholders that have served their
2 notices without coming to Your Honor don't have that problem.
3 They've cut off the discount, arguably. Therefore, by coming
4 to you and now adjourning it, not only is Merrill Lynch being
5 damaged vis-a-vis the other creditors, but we are -- in effect,
6 we are being subordinated to those noteholders who rightly or
7 wrongly did not come to you to do that. So the problem is
8 entering into the order, the agreed order, that we would
9 propose to Your Honor has no bearing whatsoever, has no
10 interference with LBHI's ability to discuss it -- global
11 protocol with the trustee. We're all for that. Because if it
12 works we can be part of it, we're fine. That's not a problem.
13 If we have an objection we can come to you at the appropriate
14 time. So there's no adverse impact in their ability to do
15 that, but Merrill Lynch gets affirmatively hurt or could be --
16 I want to reserve my rights, could be affirmatively be hurt by
17 their claim being diminished by having adjournment.

18 And if I may talk about just briefly, because it is
19 really brief, when we submitted out proposed order after the
20 adjournment issue was discussed, LBH marked up our order and
21 had their own version. All in -- we incorporated virtually all
22 their changes. The one I think substantive issue is this.

23 The language we are proposing and we got the
24 transcripts and we understand your musings, Judge, but we tried
25 to now track your language. And what you said was and what we

1 put in was, that when Merrill Lynch serves its notice of
2 acceleration across the board, to the extent that in any way at
3 the end of the day augments its claim, then that will have no
4 deleterious impact whatsoever, on these Chapter 11 proceedings,
5 subject to further order by Your Honor. It explicitly reserves
6 everybody's rights to argue whatever they want about how the
7 claim should be calculated here. And it explicitly reserves
8 LBH's right -- LBHI's right to argue that somehow if they want
9 to challenge the validity enforceability of the guarantee, they
10 can do that, too. So it is without prejudice to anything. By
11 definition it can impact their ability to get the global
12 protocol they want. It preserves our rights and Merrill
13 Lynch's claim from being diminished. And we think it's exactly
14 what mirrors what you had -- your musings last time. We're
15 happy to show it to you and you can mark it up any way you
16 want. But we don't think it's appropriate to put this off
17 again two months after we moved to begin a dialogue about a
18 global protocol that they're free to make whether you enter
19 this order or not.

20 THE COURT: I'd like to hear from Mr. Mayer in a
21 couple of respects. First, I'd like to understand the nature
22 of the prejudice in the Netherlands proceeding that has just
23 been alluded to and whether or not it's possible to stipulate
24 around that problem by agreeing that an acceleration that takes
25 place pursuant to court order would be as of, say, today's

1 date, which would be the functional equivalent of giving both
2 sides a little bit of what they want without my having to rule.
3 That's my first question.

4 My second question is whether or not you can comment
5 about the potential loss of position expressed by Merrill
6 Lynch's counsel associated with delay in acceleration? Is that
7 an appreciable issue as you understand Netherland's proceeding.

8 MR. MAYER: Thank you, Your Honor. Can I address them
9 both together? They're kind of --

10 THE COURT: Absolutely.

11 MR. MAYER: -- very merged. For the record, Thomas
12 Moers Mayer of Kramer Levin Naftalis & Frankel for the LBT
13 trustees, I'll give the reporter the exact spelling at the end
14 of the hearing, if that's okay. It's like their names are
15 lengthy.

16 Your Honor, Dutch bankruptcy law is well over 100
17 years old. And part of our problem with dealing with claims is
18 that we write on an extremely inadequate slate. And I say this
19 as someone whose knowledge of Dutch law has increased meeting
20 by meeting with sessions with my client.

21 But there is a concept of discounting back to present
22 value depending on when an acceleration occurs. And I think
23 that what Merrill Lynch is concerned about is that to the
24 extent the date of acceleration is pushed off their claim will
25 be further discounted by the passage of time. So I understand

1 Merrill Lynch's argument. I can't tell you that I support it
2 or not for the following reason:

3 My client has not decided whether or not the filing of
4 an acceleration notice, in and of itself, irrespective of the
5 automatic stay stops discounting or not. As I said at our last
6 hearing we're not eager to run to conclude to draw the explicit
7 conclusion that the automatic stay has no force and effect and
8 we will take acceleration notices without regard to what this
9 Court does, but we might get there. And if we get there then
10 there is no prejudice to Merrill Lynch, their notice is the
11 same as everybody else's notice, whether or not relief from the
12 stay is granted.

13 If we decide that everyone needs to get relief from
14 the automatic stay in order for us to recognize the notice yes,
15 then, Merrill Lynch is first past the post and they're getting
16 a benefit over all of the 394 other notices that were filed as
17 of yesterday, according to my client.

18 We're not in this to give Merrill Lynch a leg up on
19 anybody else, we're in this for administrative deficiency.

20 If I have to rank my preferable outcomes and we filed
21 papers basically in an observer's status, I'm not here
22 objecting to Merrill Lynch's motion, I'm -- we supported
23 particular relief being a finding that the automatic stay did
24 not affect calculations in the Netherlands because we had our
25 very own -- our own parochial, if I may, interest at heart.

1 First, we wanted to treat everybody equally in the Netherlands.
2 And, second, Your Honor, the process of determining claims
3 under these notices is very difficult. To give you just one
4 example, a couple of months ago we gave a trial run on one
5 issue of these notes to the folks at LBHI and it took them a
6 week. There are 4,000 notes.

7 Now, hopefully, whoever does this gets better with it
8 over time, because 4,000 times one week and we're here a long
9 time. But the point is the work of determining how to
10 calculate these notes is ongoing and it will pick up steam.
11 And there is a benefit to certainty. My client is meeting with
12 the debtors on Friday. This is an issue we hope to address.
13 In our view, what is most important is that there is a uniform
14 determination that we can reach, that both accords appropriate
15 deference to this Court and treats everybody the same. So I'm
16 not unsympathetic to the debtors' request for an adjournment so
17 that we can work all this out, but I am also not unsympathetic
18 to the notion that this thing shouldn't linger. Because if
19 we're continuing to make determinations on claims and then the
20 legal framework isn't solid, we may have to do them again, and
21 that's a bad idea.

22 So I guess, bottom-line, I can't tell you Merrill
23 Lynch is going to be prejudiced because I don't know which way
24 we're going to come out, on whether their notice is effective
25 without relief, or not effective without relief. And I can't

1 say that there is a meeting set up to discuss a global protocol
2 solution to this on Friday with the company. If the Court
3 provides an adjournment we'd more than understand it, but we
4 would hope that this process doesn't linger and at some
5 point -- and maybe we need to file a separate set of papers to
6 specifically ask for this relief in our own hook, that the
7 Court does enter an order providing that nothing -- that no
8 notice of acceleration shall have any affect on the
9 administration of the U.S. estate, but that the automatic stay
10 does not provide that notice of acceleration of whatever effect
11 it may be given in the administration of the Dutch estate.

12 THE COURT: I don't want to get into the practice of
13 once again drafting orders from the bench off the cuff. And
14 everybody is stating their own positions, and that isn't
15 necessarily what will be in the order to be entered.

16 I took a look at my calendar and I note that I have
17 some Lehman time set aside at 2 o'clock on the 21st. I believe
18 that is in connection with certain adversary proceedings. My
19 inclination having heard the various arguments is to give the
20 protocol process a chance to globalize, to use Mr. Krasnow's
21 term, this issues as it relates to the Merrill Lynch notice of
22 acceleration. And in particular to allow the parties to speak
23 principal to principal with the advice of lawyers to try to
24 develop a broader application to this potential blunt
25 instrument that we're creating. And, so, I will adjourn this

1 to the 21st at -- I have a 2 o'clock note on my calendar. I
2 don't know what the precise time will be. And rather than have
3 the lawyers who are involved in what I hope will be a very
4 concise presentation of we have an agreement sit around
5 waiting, perhaps we'll calendar that for later in the afternoon
6 at a time to be determined once I have a better understanding
7 of what the agenda looks like for January 21.

8 I'm sensitive to the arguments made by Merrill Lynch's
9 counsel that there is some potential prejudiced associated with
10 delay, but I can see no appreciable prejudice associated with
11 the delay of about one week. And I also recognize from Mr.
12 Mayer's remarks that prejudice is entirely hypothetical at this
13 moment, and may not exist at all based upon the procedures to
14 be adopted by the trustee in the Netherland's proceeding. So,
15 with that, we'll adjourn it at least until the 21st without
16 their being any assurance that I will enter any order on that
17 day. It will once again be a status report with the hope for
18 result being that the very diligent and intelligent lawyers who
19 are involved on all sides will not choose to make this a
20 contested proceeding. Because as was noted in the earlier
21 uncontested matter, there is litigation risk to be avoided.

22 MR. MAYER: Thank you, Your Honor. May I be excused?

23 THE COURT: You may.

24 MR. MAYER: And may I approach the reporter with the
25 correct spelling of my client's name?

1 THE COURT: You may.

2 MR. KRASNOW: Thank you, Your Honor. And if I may be
3 excused to attend the global protocol meeting?

4 THE COURT: You certainly may.

5 MR. KRASNOW: Thank you, Your Honor.

6 THE COURT: And anyone else who needs to be excused or
7 who wants to leave may also leave.

8 And for those who are listening in on the telephone
9 please make sure that your phones are muted.

10 MR. WAISMAN: Your Honor, Shai Waisman for Lehman
11 Brothers.

12 We are now at matter number 7 on the amended agenda
13 filed last night. This is LBHI's motion for authorization to
14 sell certain asset backed securities and related relief.

15 By this motion, Your Honor, the debtors seek three
16 forms of relief. Establishment of procedures to sell asset
17 backed securities with an approximate value of about 180
18 million dollars authorizing the debtors to, in essence,
19 authorize Neuberger Berman, who manages these securities, to
20 exercise rights that come along with the ownership of those
21 securities and authorizing the debtors to hedge against certain
22 risks in the ownership of the securities in certain amounts
23 specified in the order.

24 Your Honor, the motion was filed on December 23rd and
25 served, objection deadline was January 6th. One objection was

1 filed, that was the objection of U.S. Bank. Your Honor, the
2 debtors have spoken at length to U.S. Bank have provided U.S.
3 Bank with a list of securities. U.S. Bank has indicated that
4 based upon its review it does not believe it has any interest
5 in the securities and has asked that the debtors also represent
6 on the record, which I am now doing, that we do not believe
7 that U.S. Bank has any interest in these securities. And with
8 that representation, that objection has been withdrawn.

9 I'm happy to answer any questions Your Honor may have.
10 Otherwise, we ask that the order be entered authorizing the
11 relief requested.

12 THE COURT: Does anyone wish to be heard with respect
13 to this matter? Apparently, somebody does.

14 MR. PRICE: Craig Price from Chapman & Cutler on
15 behalf of U.S. Bank.

16 And I'm just confirming what the debtor said is indeed
17 correct. We have reviewed the list of securities to be sold,
18 and U.S. Bank does not believe -- it does not appear that any
19 of them are related to U.S. Bank. So we're withdrawing our
20 reservation on that.

21 THE COURT: Everybody seems to stipulate that you have
22 no interest here.

23 MR. PRICE: That's right.

24 MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank
25 Tweed Hadley McCloy, on behalf of the committee.

1 I'm just confirming that we have reviewed this motion.
2 And, in fact, our derivative subcommittee signed off on it.
3 Provides for a role for the committee that's comparable to the
4 role it has with respect to other asset classes and we're
5 comfortable with the procedures as proposed.

6 THE COURT: Fine. This is now an uncontested matter
7 and it's approved.

8 MR. WAISMAN: Thank you, Your Honor. The next matter
9 on the calendar is a motion of Seattle Pacific University. And
10 I would ask their counsel to come forward on the matter.

11 THE COURT: Okay.

12 MR. MICHAELSON: Good morning, Your Honor. Robert
13 Michaelson of K&L Gates on behalf of Seattle Pacific
14 University.

15 This is a motion to compel the debtor to assume or
16 reject an interest-rate swap agreement. By way of background
17 my client is a not-for-profit educational institution located
18 in Seattle. It is not well endowed. This agreement was
19 entered into in order to hedge its liability under a twenty
20 million dollar bond use for the construction of facilities at
21 the college. In other words, this agreement is an insurance
22 policy against unforeseen or excessive increases in the
23 interest rate because it's a floating rate.

24 Now, there is a representation been made to the Court
25 by debtors' counsel that we had an opportunity to reject this

1 agreement pursuant to 560, to walk away from it pursuant to the
2 Safe Harbor provisions. We did not. And the reason we did not
3 was because we were under the impression based on conversations
4 with debtors' counsel that this agreement would be assumed and
5 assigned, or at least a strong effort would be made, and that
6 there would be a possibility -- I don't want to characterize
7 the likelihood of the possibility. We relied on that and we
8 reserved our rights accordingly.

9 It became obvious to us over time that this wasn't
10 going to happen. And we became increasingly concerned about
11 what would ultimately become of our position should this be
12 rejected. At this point we are paying, as we're required to
13 under the agreement, but we're really paying for an insurance
14 policy that won't be there should we ever need it. We need to
15 cover ourselves and we understand that in order to do that we
16 need to extricate ourselves from this agreement.

17 We don't believe that this agreement is one that is
18 readily assignable for one reason that's a bit peculiar to this
19 agreement.

20 THE COURT: I read that in your papers and I
21 understand the issue of one-way posting of collateral in this
22 particular transaction. I gather that Lehman is required to
23 post collateral but your client is not. And as a result from
24 the perspective assignee, you at least allege that that makes
25 this a difficult agreement to assign, correct?

1 MR. MICHAELSON: That is correct, Your Honor.

2 THE COURT: Okay. I understand that's your argument
3 but it's just an argument. And I don't know anything yet about
4 the actual marketing efforts with respect to this swap
5 agreement, nor do I have any expert reports or testimony to
6 confirm the allegation. So I want you to know that at least
7 from an evidentiary perspective, I accept what you're saying,
8 but I have no way of knowing if it's correct. And it's not
9 going to be determined today.

10 MR. MICHAELSON: I understand that, Your Honor.
11 However, even aside from that issue we do know one thing. We
12 know that it has not been assigned as of this date. I don't
13 think that the debtor is going to deny that efforts have been
14 made and that those efforts have been unsuccessful. In the
15 meantime, we continue to be paying what are essentially
16 premiums on an insurance policy that will not be there should
17 circumstances change, interest rates are obviously the
18 governing force here, and we will be left naked.

19 I know there are other institutions that have these
20 sorts of contracts. And I simply want to reiterate what I said
21 at the beginning of my presentation, which is this is an
22 institution that is not wealthy that depends very heavily on
23 its ability to finance these construction bonds. And if the
24 interest rate were to shift dramatically they would not have
25 the reserves of an institution like a Harvard or Yale in which

1 to cover these. So they're left exposed and need to protect
2 themselves. And all we're asking for at this point is for the
3 debtor to make up its mind so that we can do what we need to
4 do. If there is an assignee out there we'd be delighted. But
5 if there is no assignee and there is no prospect for an
6 assignee in the immediate future leave us to do what we need to
7 do to protect ourselves. And that's really all that we're
8 asking for, Your Honor.

9 THE COURT: Well, I think you're asking for more than
10 that. You're seeking by virtue of the motion your prosecuting
11 to compel the debtor, in effect, to reject this now and to
12 allow you to go about your business and not have to pay them
13 money. And this is an in the money swap. And I also
14 understand that ADR has been demanded by Lehman in connection
15 with this transaction. So this is not as simple as you portray
16 it, at least in my view it's not.

17 I like your comments as to why I should decide
18 anything in connection with a matter that has been, at least
19 from Lehman's perspective, assigned to the ADR process.

20 MR. MICHAELSON: Your Honor, I'm glad you asked that
21 question, because I'm not sure the ADR process is applicable in
22 this situation. As we read paragraph 3(a) of the ADR process
23 in order for there to be some sort of alternative dispute
24 resolution there has to be a terminated -- a swap agreement
25 does not apply if the swap agreement -- let me read this so

1 there's no confusion about it. Paragraph 3(a) of the ADR order
2 indicates, "That the ADR procedures do not apply if the swap
3 agreement has not been terminated." This swap agreement hasn't
4 been terminated. So it's our view under what I think is clear
5 language of the order, the ADR, that alternative dispute
6 resolution, isn't applicable or available in this matter.

7 THE COURT: Why don't I hear from Lehman, at least --
8 not only in opposition to the motion on the merits, but also as
9 it relates to the whole question of the applicability of
10 alternative resolution procedures.

11 MR. LEMONS: Good morning, Your Honor. Robert Lemons
12 from Weil Gotshal & Manges on behalf of the debtors.

13 I'll start with the ADR procedures applicability,
14 because I think it's a -- certainly a simpler answer and that's
15 where SPU's counsel left off.

16 Your Honor, SPU's counsel said he wanted to read you
17 the words so that there wouldn't be any misunderstanding or
18 miscommunication. I think that's interesting because he left
19 out a critical word when he read you the words. The words are
20 not "has not been terminated" the words are "has not been
21 purportedly terminated." The word purportedly was inserted in
22 that order for a purpose. The reason it was put in there is
23 because as Your Honor is aware, the debtors have received
24 numerous termination notices, some of which they contest and
25 many of which -- some of which they do not contest, and many of

1 which they do contest. So this word was inserted in there and
2 the procedures were established so that among other types of in
3 the money contracts to the debtors the ADR procedures would
4 also apply to those where a counterparty has purported to
5 terminate what the debtor may dispute the effectiveness of that
6 termination. So, Your Honor, we believe after SPU has
7 purported to terminate this contract, that it clearly falls
8 within the scope of the ADR procedures and is eligible for
9 those. And we believe that the notice that we have served on
10 SPU to trigger those procedures is certainly effective.

11 THE COURT: Okay. I've read your papers, I'm familiar
12 with this. I'm also familiar with the disputed reply that was
13 filed yesterday by Seattle Pacific University. And I'm not
14 sure if I was supposed to read it, but I actually read the
15 exhibit which is the demand for ADR, which was Exhibit A to
16 that reply. Was I supposed to have seen that or not, I have no
17 idea?

18 MR. LEMONS: Your were not, Your Honor. I'm not sure
19 that makes it a significant difference, but under the terms of
20 the ADR that was not something you were supposed to see. I
21 believe that was inadvertent on SPU's behalf. And when we
22 informed their counsel they took steps promptly to withdraw it.
23 But it sounds like it may have made it into your chambers
24 before the withdrawal was complete.

25 THE COURT: I read it with great interest. It doesn't

1 influence my decision on this motion, however. The content of
2 the ADR demand, the position asserted by Lehman and any defense
3 to that position taken by Seattle Pacific University are all
4 irrelevant to the disposition of the pending motion.

5 What is relevant it seems to me is that there is a
6 procedure that the debtors have sought to employ to try to reach
7 some kind of accommodation, mutually acceptable, I assume,
8 because that's what ADR is about, with Seattle Pacific
9 University as to this in the money swap transaction. It makes
10 sense it seems to me for that procedure to run its course
11 before I deal with the merits of this motion. And, frankly,
12 from Seattle Pacific's perspective it's a plus. Because if
13 there were no ADR procedure available to perhaps lead to a
14 mutually acceptable resolution of the issues in dispute, I
15 would deny the motion. So the good news is there's a procedure
16 that you can all look to to maybe get to the business
17 accommodation you need to reach. The bad news is if you didn't
18 have that this motion would be denied without prejudice. And I
19 say that because at this moment while there is hypothetical
20 risk to an undoubtedly sympathetic counterparty at some future
21 date if there is a move in interest rates that's not a risk
22 today that I can value. And to the extent that we have an in
23 the money contract I'm not going to accelerate the time for the
24 debtor to assume or reject simply because I have a sympathetic
25 counterparty. The contract is what it is. Says what it says.

1 And the debtor has the time available under the Bankruptcy Code
2 to make its decision to assume or reject.

3 I say that in no way to limit the discretion that I
4 have under 365 in appropriate cases to accelerate the time, and
5 it may be that at some time in the future I might conclude that
6 Seattle Pacific has shown cause. Such cause has not been shown
7 as of today.

8 MR. LEMONS: Thank you, Your Honor.

9 MR. WAISMAN: Your Honor, my colleague Peter
10 Gruenberger will present the next motion.

11 THE COURT: All right.

12 MR. GRUENBERGER: Thank you, Your Honor. Good
13 morning, Your Honor. Peter Gruenberger, Weil Gotshal & Manges,
14 counsel for LBSF and affiliated debtors.

15 I am here today pinch-hitting for my partner, Richard
16 Slack. Unfortunately, he's in another city, in another court
17 today on an emergency and he apologizes for not being here.

18 Your Honor, I can't promise that --

19 THE COURT: He should be apologizing to you.

20 MR. GRUENBERGER: He has already in spades. I can't
21 promise that my remarks are going to be as interesting as those
22 proffers we heard earlier today, but I'm going to try to raise
23 the excitement level from that a little bit.

24 As Your Honor is aware, on October 28, 2009 LBSF filed
25 a motion to compel Capital Automotive to perform its obligation

1 pursuant to the 2006 master agreement between the parties,
2 which agreement the parties' papers have labeled the swap
3 agreement. On November 30, 2009, Capital Automotive filed an
4 objection to that motion to compel with two supporting
5 declarations. Those opposition papers, Your Honor, were
6 replete with references to negotiations and communications
7 between the parties relating to potential settlement of
8 disputes between as to the swap agreement at issue. LBSF
9 believed all such references were barred explicitly by the very
10 specific terms contained in a negotiation agreement that
11 Capital Automotive itself drafted.

12 For that reason after a chambers conference in
13 December we moved to strike Capital Automotives objection to
14 the motion to compel. It is that motion to strike that is
15 before Your Honor today. The merits of the motion to compel
16 are not before the Court today.

17 We served our motion to strike on December 23, 2009,
18 Capital Automotive filed timely it's objection thereto on
19 January 5, 2010. We filed our reply yesterday morning.

20 I ask permission, Your Honor, to hand up a hearing
21 binder which will aid the Court in following word-by-word the
22 numerous ways in which Capital Automotive has ignored the
23 negotiation agreement, violated its terms and in so doing
24 simultaneously has attempted to rewrite the swap agreement at
25 issue. May I approach, Your Honor?

1 THE COURT: You may approach with the hearing binder.
2 Okay. Just so long as this isn't flown around the courtroom as
3 a weapon.

4 Before we get into the substance of the hearing
5 binder, I want everybody involved in this particular dispute to
6 understand what my current perspective is on it so that you can
7 mold your comments to some of my concerns.

8 One of my concerns is that this seems to be a
9 proliferation of litigation in a case which already has a fair
10 degree of active motion practice in it. And when we had our
11 chambers conference that was really a telephone conference I
12 was not encouraging in respect of the filing of this motion to
13 strike, and made the comment that to the extent that there was
14 a violation of the negotiation agreement or a violation of Rule
15 408 of the Federal Rules of Evidence that it was an evidentiary
16 question and we're not having an evidentiary hearing today.
17 Mr. Gruenberger, you said so yourself, this is just a hearing
18 on the motion to strike --

19 MR. GRUENBERGER: Right.

20 THE COURT: -- not on the merits. Additionally,
21 motion practice in the Lehman case generally and in basically
22 every single case I have on my docket is not at least at the
23 first call of the motion, an evidentiary hearing, if an
24 evidentiary hearing is required it's later scheduled. So I
25 have a threshold question which is is it even appropriate for

1 me to be considering on a motion to strike basis material that
2 I have already read? I mean, this is in some respects very
3 much like the last case with Seattle Pacific, where I wasn't
4 supposed to have read the ADR demand, but I did read it. Well,
5 I read the declarations which set forth from Capital
6 Automotive's perspective, the back and forth of negotiations,
7 some of which were detailed and some of which were general, and
8 most of what I supposed you are concerned about reflect a
9 perception, to use your reply papers terms, that Capital
10 Automotive was "bamboozled" by your client. Not by you,
11 personally, but that this whole process as it relates to the
12 negotiation that I wasn't supposed to learn about, was unfair
13 from the perspective of Capital Automotive.

14 Let's just say for the sake of discussion that none of
15 that detail was presented to me and that all that Capital
16 Automotive was saying in their motion papers was the following:
17 "Judge, we have a negotiation agreement, we're going to honor
18 it. But let me tell you something, if it weren't for that
19 agreement we'd be able to tell you a parade of horrors of the
20 activities of Lehman Brothers' employees who misled us. and if
21 it weren't for those misleading statements we would have
22 terminated this swap agreement in December of 2008." I'm being
23 purely hypothetical in what I just said.

24 But if they had filed papers that said that how is
25 that different in terms of the motion practice that's before me

1 in February from my seeing more detail as to what they have to
2 say? That's question one.

3 Question two, what's the proper remedy for a violation
4 of the negotiation agreement? Is it a motion to strike? Is it
5 an adversary proceeding seeking equitable relief in the form of
6 an injunction that would prohibit certain activity? Is it an
7 action for damages? Is it simply a defensive posture that you
8 make in the context of the motion, itself? Is it a motion in
9 limine before an evidentiary hearing that might take place at
10 some point in the future? In other words, is the motion to
11 strike even appropriate? And finally, I recognize that there
12 may be some policy issues here that go beyond the matter at
13 issue with Capital Automotive. And here's what I think it is.

14 I think that most of the activity in the Lehman
15 bankruptcy case takes place outside the courtroom. I think
16 that a lot of the activity that takes place in the courtroom is
17 staged. This is, like, the Lehman Theater. We have an
18 audience. We have proffers. We have very well prepared
19 lawyers. And the material which is presented to me is
20 distilled. It's distilled because good lawyers are involved on
21 all sides. It's distilled because really confidential
22 information shouldn't be on the public record sometimes. It's
23 distilled because we have the press in the room and we have an
24 open courtroom, as we should, where the public is available to
25 hear what is supposed to be a transparent proceeding.

1 Nonetheless, I recognize that a lot of what is
2 important in complex business negotiations is intended to be
3 private. Are you pressing this motion because you believe the
4 negotiation agreements, such as this one, from a policy
5 perspective need to be enforced or are you pressing this motion
6 simply as a preemptive evidentiary objection? If it is the
7 former, I'm interested in hearing argument as to the policy
8 issue. And that's my reason for the preamble to that last
9 question. And my suggestion is that while I'm happy to see
10 anything that you want me to see in any order you want me to
11 see it in the hearing binder that I've already expressed to you
12 what I'm most interested in in today's argument.

13 MR. GRUENBERGER: Your Honor, I'll try to take up each
14 one of those. It's like running the 440 hurdles. I set up
15 some hurdles, I've got to clear them, I shall.

16 THE COURT: Okay.

17 MR. GRUENBERGER: Take the last question first. It's
18 the former, certainly, not the latter. Is it appropriate
19 today? Yes. If the motion to compel had been responded to on
20 the merits without violating an agreement, then that motion to
21 compel would have been proceeded with in the manner that we
22 representing debtors always proceed with things; directly and
23 not for show, not for theater. Your Honor, we seek the last
24 harmful remedies. I think Mr. Lemons in responding to the
25 prior motion by Seattle Pacific University, they could have

1 moved for sanctions for that violation of the ABR order and
2 Your Honor is very aware of who drafted that order. I did.
3 They could have moved for sanctions. We could have. We
4 didn't. We asked them to remove it from the record without
5 theater. We're not making theater here.

6 Your Honor's hurdles, however, omitted one thing. And
7 I think this was inadvertent on Your Honor's part. We're
8 talking about the sanctity of contracts. Your Honor left that
9 out.

10 There's a message that's going to be taken away from
11 this hearing not by this counterparty but by a lot of
12 counterparties. And let's focus today just on post-petition
13 contracts like this negotiation agreement. When I finish
14 today, Your Honor, I hope I will have persuaded you that the
15 facts upon which we rely will show that this counterparty has
16 ignored every word in a contract it presented to us to sign.
17 And rather than reward such conduct, I think that the objection
18 should be stricken.

19 Now, you ask for what other remedies could exist?
20 Well, we could have asked for cost in making this motion to
21 strike. We didn't do that. We aren't trying to be vindictive.
22 We're just trying to get people to abide by contracts
23 especially ones they make with debtors' post-petition and
24 especially ones they draft and ask us to sign.

25 THE COURT: Mr. Gruenberger, let me just ask you a

1 question about something I perhaps don't need to know and maybe
2 shouldn't know.

3 Is the negotiation agreement which was entered into in
4 connection with the discussions between Lehman and Capital
5 Automotive, even though it was drafted by Capital Automotive's
6 counsel, as I understand it, a form of agreement that Lehman
7 regularly and routinely enters into before engaging in
8 discussions of this sort? If the answer to that is yes, this
9 becomes a classwide issue. If the answer to that is no, this
10 is a one of a kind or a relatively rare example of a party
11 being extra careful that leads me to a different place. Which
12 is it?

13 MR. GRUENBERGER: To my knowledge, Your Honor, this is
14 unique. This is not part of Lehman's regular course of
15 business and negotiations. I'm not aware of any.

16 THE COURT: Okay. So this is not a situation where
17 we're seeking to protect the sanctity of allegedly private and
18 confidential negotiations relating to settlement pursuant to a
19 form of agreement that Lehman regularly uses. This is rather a
20 one-off situation.

21 MR. GRUENBERGER: No, Your Honor. I don't agree with
22 that however, and let me draw the distinction. A contract is a
23 contract. You just said that yourself. I don't want to quote
24 you back from another matter but the last matter you just said,
25 "A contract is a contract and it goes where it goes". I don't

1 think we have different rules for negotiation agreements,
2 agreements to buy and sell, agreements to assume or reject. I
3 think we have agreements that should be honored or should not
4 be honored. And the message that I would like to send away
5 after this motion is decided is that contracts ought to be
6 honored not dishonored.

7 THE COURT: I won't disagree with you that contracts
8 are intended to be performed, but that's not really the point.
9 The point is whether or not a motion to strike certain
10 statements that were made in papers filed by Capital Automotive
11 should be stricken on account of alleged violations of the
12 contract. We're not dealing with a contract in an abstract
13 way. We're dealing with the application of a particular
14 contract to particular allegedly inappropriate conduct.

15 MR. GRUENBERGER: Correct, Your Honor. And when we
16 get to the statement of the law, I will cite you law that says
17 that this is the appropriate remedy when this type of agreement
18 is violated.

19 THE COURT: Okay. Why don't you go ahead? It's now
20 high noon.

21 MR. GRUENBERGER: Thank you. And now, the hearing
22 binder -- the hearing binder, Your Honor, does not contain any
23 cases. It does not contain argument of law. It doesn't
24 contain legal argument from me or anybody else. There's no
25 clever spin on the facts whatsoever. All it is in the binder

1 is in three distinct parts we have documents of record and only
2 documents of record in this case. Each part rebuts beyond per
3 adventure, I believe, each one of the three themes that Capital
4 Automotive has woven seeking to justify its use of settlement
5 negotiations and communications.

6 Theme 1 is that the negotiation agreement is merely a
7 restatement of Federal Rule of Evidence 408. A rule that
8 generally precludes evidentiary use of settlement talks to
9 prove liability but permits use of settlement talks for other
10 purposes. A standard Courts have always used in applying Rule
11 408.

12 Tabs 1 through 7 of the binder, Your Honor, set forth
13 the specific terms of the negotiation agreement revealing
14 clearly that that agreement is the exact antithesis of Rule
15 408. And unlike Rule 408 stands as an explicit bar to the very
16 uses to which Capital Automotive has put the settlement
17 negotiations and communications and has done so in an attempt
18 to negate LBSF's contention that Capital Automotive unduly
19 delayed exercising its rights under the swap agreement. Now,
20 those words become very important. And I'm going to come back
21 to them again.

22 Theme 2, they read, is that the negotiation agreement
23 does permit use of negotiations and communications in
24 connection with attempts to enforce rights and remedies under
25 the swap agreement and that such enforcement is all that

1 Capital Automotive innocently was trying to accomplish by way
2 of its references to the negotiations.

3 Well, Tabs 8 to 10 of the hearing binder, Your Honor,
4 set forth specific sections of the swap agreement that
5 demonstrate that the alleged rights and remedies that Capital
6 Automotive was trying to enforce never existed at all and thus
7 are not capable of being enforced in this or any other matter
8 suggested by Capital Automotive. Rather, as we demonstrate,
9 Capital Automotive has tried to use the negotiations and the
10 communications to rewrite the swap agreement's terms.

11 Theme 3, that Capital Automotive puts forth is that it
12 has no idea about which communications and negotiations we're
13 complaining about. No idea at all. However, Your Honor, on
14 the Tabs 11 through 23, we set forth thirteen specific
15 paragraphs, word by word, that add two declarants in support of
16 their motion to object -- their objection to our motion to
17 compel filed and those declarations led to this motion to
18 strike. Those declarants very words pull away the simple sun
19 mask that Capital Automotive would wear in this courtroom
20 today.

21 Let me begin with the cavalier approach that this
22 negotiation agreement is Rule 408 in another cloth. That poses
23 rarely undermined by just a cursory comparison of the words of
24 Rule 408 with the words of the negotiation agreement. We have
25 set forth the entire Rule 408 at pages 8 and 9 and paragraph 18

1 of our reply brief.

2 Rule 408 on its face provides only for certain limited
3 protections against disclosure as follows: A) Prohibitive
4 uses. Evidence in the following is not admissible on behalf of
5 any party when offered to prove liability for invalidity of or
6 amount of a claim that was disputed as to validity or amount or
7 to impeach through a prior inconsistent statement or
8 contradiction. And there are two different things that are
9 prohibited. You can't talk about furnishing or offering or
10 promising to furnish or accepting or offering or promising to
11 accept a valuable consideration in compromising or attempting
12 to compromise a claim. And 2) Conduct or statements made in
13 compromised negotiations regarding the claim.

14 And 408(b) talks about permitted uses. That says,
15 "This rule does not require exclusion if the evidence is
16 offered for purposes not prohibited by subdivision A. This is
17 still", I'm quoting, "within the rule examples of permissible
18 purposes include among other things" and I'm emphasizing this,
19 "include among other things negating a contention of undue
20 delay."

21 Now, Your Honor will notice that Capital Automotive
22 nowhere in its objection anywhere cites all of Rule 408 or
23 quotes its terms. Rather, through a clever use of ellipses,
24 Capital Automotive's objection at page 12, footnote 6, omits
25 that key language from 408(b). They omit examples of

1 permissible purposes include "negating attention, a contention
2 of undue validity", unquote. They just leave it out. There's
3 a reason they leave it out. Because that's exactly what they
4 put into the negotiation agreement could not be done. They put
5 into the negotiation agreement that no negotiations or
6 communications can be used to try to prove or negate a
7 contention of undue delay. I'm going to take you through the
8 agreement and show you exactly where that is.

9 Under Tab 1 of the binder, Your Honor, we have the
10 whole negotiation agreement. Under the succeeding tabs we have
11 pullouts. So that Tab 2 shows, or paragraph 2, what this is
12 definition of negotiations defined as covering all discussions
13 and negotiations concerning the parties obligations to each
14 other under or relating to the swap agreement including its
15 termination.

16 The definition of communication as it's contained
17 under Tab 3. Paragraph 3 defines communications as all
18 correspondence, discussions, negotiations, meetings, graphs and
19 telephone communications among the parties or their respective
20 attorney, agents and representatives with respect to the swap
21 agreement or with respect to defined -- the defined term
22 negotiations.

23 The main guts of the negotiation first appear in
24 paragraph 2 contained under tab 4 where it says, quote, "It is
25 understood that the negotiations and any communications shall

1 be made with a view toward compromise and settlement and all
2 such negotiations shall be protected accordingly and shall not
3 be admissible as evidence on any issue that is or may be before
4 any court or administrative body including without limitation
5 as proof or admission of liability for -- or for other
6 evidentiary purposes." Let's allow that one to sink in for a
7 moment.

8 No use as proof or admission of liability or for other
9 evidentiary purposes. These words alone directly contradict
10 Capital Automotive's twisted argument that it may use
11 negotiations and communications to negate LBF's (sic)
12 contention that Capital Automotive was guilty of undue delay.
13 But that isn't all that's in the agreement. It goes on much
14 further and much more directly.

15 Under tab 5, Your Honor, we find the specific terms of
16 paragraph 4 of the negotiation agreement in which Capital
17 Automotive expressly agreed that negotiations and
18 communications were contemplated for purposes of compromise and
19 settlement and that no such negotiations or communications
20 shall ever be admissible for any other purposes such as a
21 purpose to prove intent or to negate a contention of undue
22 delay or any other purpose. So much for their argument that
23 this is exactly like Rule 408. It's the exact antithesis of
24 Rule 408. Thus, we have no quarrel with the Second Circuit
25 cases that Capital Automotive cites at pages 12 to 15 of their

1 objection because under those cases we win.

2 Those cases include the 1989 case of Trebor,
3 T-R-E-B-O-R Sportswear v. Limited Stores, 856 (sic) F.2d 506 at
4 page 511 and the 1999 case of Starter v. Converse, 170 F.3d 286
5 at page 293. Both cases state the age-old standard; governing
6 application of 408 in both (a) and (b). Evidence of a
7 settlement agreement and surrounding circumstances though
8 barred by 408(a) can fall outside the rule if offered for
9 another purpose. But that age-old application of 408 does not
10 and cannot fit here where the parties have agreed expressly
11 that such other purposes are also barred from use including the
12 ones about intent and the one about negating undue delay
13 assertions.

14 And thus, Your Honor, I now turn to the case that says
15 that we're doing exactly the right thing by moving to strike.
16 The Connecticut District Court in the 2006 case, Victor G.
17 Reuling, R-E-U-L-I-N-G Associate v. Fischer Price Toys, 407 F.
18 Supp. 401 at page 404, the Court struck all references to
19 negotiations because of an agreement signed by the parties that
20 is here barred any use thereof for any purpose. We seek the
21 same relief here because the facts here are even better for
22 LBSF than they were for the movant in that case.

23 It's ironic, Your Honor, that the party who drafted
24 this agreement contended all these encompassing restrictions
25 which stand here today contending it has the right to try to

1 use the negotiations and communications that it said should not
2 be used to create the impression that we agreed to a
3 termination of a swap agreement in December 2008. And that
4 Capital Automotive uses these negotiations and communications
5 merely to try to enforce its alleged rights and remedies under
6 the swap agreement.

7 But happily for us and unhappily for Capital
8 Automotive, the negotiation agreement and swap agreement
9 itself, I think, bar and I think Your Honor will conclude, bar
10 such a tortured assertion.

11 Under tab 6 of the binder in paragraph 3 of the
12 negotiation agreement, Capital Automotive agreed that, quote,
13 "No amendment, modification, compromise, settlement, agreement
14 or understanding with respect to the swap agreement and no
15 rights, claims, obligations or liabilities of any kind either
16 express or implied shall arise or exist in favor of any party
17 or be binding upon any party or other person as a result of the
18 negotiations or communications except to the extent set out in
19 a written agreement executed by all parties to be bound."
20 There is no such writing in this matter, signed or otherwise.
21 That is not all.

22 In the fifth and last paragraph of the negotiation
23 agreement, under tab 6 also, the parties acknowledged that they
24 had executed that agreement, quote, "With the goal of engaging
25 in negotiations or communications in an open, frank and direct

1 manner without risk of exposure to liability as a result
2 thereof and an order to avoid any claim or allegation that the
3 swap agreement or any obligation arising thereunder has been
4 modified, amended, waived or altered in any matter -- in any
5 manner whatsoever by the negotiations or any communications."
6 Yet, that is exactly what Capital Automotive stands here today
7 trying to do.

8 And finally, with respect to the bamboozle point Your
9 Honor alluded to earlier, the negotiation agreement in
10 paragraph 2 under tab 7 gives the absolute deaf note to that
11 last melody Capital Automotive plays in its Theme 2. It's
12 criticism to LBSF for allegedly stringing Capital Automotive
13 along by pretending to continue with negotiations but not even
14 settling this dispute or giving notice that it was terminating
15 negotiations. That's their allegation. Unhappily for Capital
16 Automotive on this brand of its theme, paragraph 2 of the
17 negotiations where it clearly provides and expresses that no
18 party shall have any obligation to commence any negotiation or
19 once -- and if commenced to continue with such negotiations and
20 any party and such parties sole and absolute discretion may
21 terminate the negotiations at any time and for any or no reason
22 with or without cause or notice.

23 Your Honor, I now turn to the matter in which Capital
24 Automotive has tried to use these negotiations for settlement
25 to change the swap agreement itself.

1 As Your Honor is well aware, Section 6(a) of the
2 master swap agreement set forth, and it's under tab 8 in the
3 binder, that " A noninformed party may give notice to the
4 defaulting party specifying a relevant event of default", here
5 LBHI's Chapter 11 filing of September 15, 2008, "and the rights
6 of designated day not earlier than the effective date of the
7 notice as the early termination date."

8 The record is clear here that Capital Automotive never
9 sent any termination notice to LBSF prior to November 30, 2009
10 some fourteen months after the Chapter 11 filing and more than
11 a month after LBSF had filed its motion to compel performance.
12 Nor can there be any dispute that this fourteen month late
13 termination notice in it Capital Automotive tries retroactively
14 to backdate the effectiveness of the termination back to
15 December 1, 2008.

16 At the same time, Capital Automotive, through what we
17 believe are illicit uses of negotiations and communications
18 occurring between January and August 2009 argues that somehow
19 LBSF magically knew that the swap agreement had been terminated
20 in December 2008. That's what they contend. But the swap
21 agreement itself, Your Honor, in paragraph 9(b) and this is
22 under tab 9, requires that any amendment, modification or
23 waiver in respect of the swap agreement is not effective unless
24 in a writing executed by each of the parties. This is the same
25 writing requirement that the termination -- I'm sorry, the

1 negotiation agreement by Capital Automotive contains. We just
2 looked at it

3 And just to make certain that there could be no
4 misunderstanding about the swap agreement, it provides in
5 Section 12, and that's under tab 10, that "Any notice of
6 communication given in respect of the swap agreement may be
7 given only by some form of writing." A writing. Not by smoke
8 signals, not by smoke and mirrors and not by smoking anything
9 else, Your Honor, and certainly not by a notice of termination
10 that was never sent to or agreed to in writing by LBSF.

11 THE COURT: That's a nice reference to the 60s there.

12 MR. GRUENBERGER: Well, some of us were there.

13 Your Honor, now having established that the
14 negotiation agreement forecloses use of negotiations or
15 communications to effect modifications of the swap agreement, I
16 turn to the Theme 3 assertions by Capital Automotive that they
17 are still unaware of precisely how it violated the negotiation
18 agreement pretending that our motion to strike was not clear
19 enough when it cited the precise sections and pages of Capital
20 Automotive's objection to motion to compel that contain the
21 offending uses of negotiations and communications.

22 That reference should have been good enough, but just
23 to make sure that the record is clear on this, Your Honor, tabs
24 11 through 13 of the hearing binder contain the exact words
25 used by the two declarants who filed declarations supporting

1 Capital Automotive's objections.

2 Now, let's look at the declaration of Roger Statle
3 (ph.), dated November 30, 2009 which contains an entire section
4 entitled "Negotiations between the parties". I think that
5 label has a familiar and telling ring to it. And under that
6 section, under tab 11 in paragraph 19, Statle refers to a
7 specific telephonic negotiation on December 17, 2008 with an
8 LBSF representative describing the outlines of an alleged
9 potential settlement.

10 Then, under tab 12, paragraph 20, Statle sets forth
11 what he believes was the intent of both negotiating parties.

12 And under tab 13 in paragraph 21, Statle again uses
13 negotiations and a specific e-mail in an attempt to evidence
14 both parties alleged intent concerning the framework of
15 settlement including discounts. Your Honor will recall that
16 the negotiation agreement specifically bars use of negotiations
17 as evidence of intent.

18 Then, under tab 14, in paragraph 22, Statle asserts
19 that in January 2009, LBSF made a settlement offer as further
20 proof of the party's alleged common understanding using
21 specific dollar signs.

22 And under tab 15, Statle describes an alleged January
23 2009 counteroffer by Capital Automotive using specific dollar
24 amounts.

25 And under tab 16 paragraph 24, he again asserts LBSF's

1 understanding of how close the parties allegedly were to
2 settlement as of January 12th, 2009.

3 And in paragraph 26 under tab 17, Statle describes yet
4 another counteroffer made on February 17 by Capital Automotive
5 with more specific dollar amounts included. On and on and on
6 to paragraph 27, 28 where Statle does it again and again but
7 not resting with one declarant, they had another one, Mr.
8 Dennis Rosenfeld, and so he does the same thing.

9 And under tabs 21, 22 and 23, he too talks about the
10 intent of the parties, the settlement descriptions that the
11 parties were engaged in all barred by the negotiation
12 agreement.

13 Your Honor, I have nothing further and I don't think
14 anything further is needed to send this counterparty and all
15 counterparties in these cases of Lehman, these Chapter 11
16 cases, a clear message from the Court. That message ought to
17 be that agreements really do mean something. They are not
18 chess pieces to be moved around at the whim of a counterparty
19 depending on any day how the winds may be blowing or how
20 interest rates may be moving.

21 Debtors submit, Your Honor, respectfully that anything
22 less than the striking of these objections and these offensive
23 uses of negotiations and communications may transmit the wrong
24 message. One that says parties can walk away from contracts,
25 walk away from their commitments with no accountability. And

1 that's what we're talking about; accountability. We trust that
2 the Court will rule on the side of accountability and send the
3 appropriate message.

4 I hope I've answered your questions and I'm here to
5 answer any more Your Honor may have

6 THE COURT: Not quite. You haven't quite answered
7 them in this respect and this is still something that's
8 bothering me.

9 Declarations were submitted in connection with the
10 original papers filed by Capital Automotive and you've
11 highlighted the sections of the declarations that the debtors
12 view as offensive.

13 MR. GRUENBERGER: Correct.

14 THE COURT: But at the moment, these declarations have
15 not been offered into evidence. There's no evidentiary hearing
16 in connection with the substance of the motion. In fact,
17 that's not to be heard --

18 MR. GRUENBERGER: Right.

19 THE COURT: -- as I understand until February 10th.
20 And at least at this moment, what I conclude you're seeking is
21 a preemptive evidentiary determination that if these
22 declarations were to be offered, they should not be admitted
23 because they are -- they have been crafted in violation of the
24 negotiation agreement Apparently, you're seeking more than
25 that.

1 You are seeking a determination that it's a violation
2 of the agreement to have prepared and filed the declarations in
3 the first place and that the negotiation agreement precludes
4 any use whatsoever --

5 MR. GRUENBERGER: Or attempt to use, Your Honor.
6 Those are the words it uses.

7 THE COURT: -- well, let's go to that language. Let
8 me understand how the language of the negotiation agreement
9 ties to the motion to strike at this stage of the proceeding.

10 MR. GRUENBERGER: Okay. Well, there are several ways
11 to approach that, Your Honor. If Your Honor comes from the
12 point of view that everybody is entitled to two bites of the
13 apple, that is that you can just ignore an agreement and if
14 you're caught then we have time to talk about it. That the
15 agreement says you can't try to introduce it and by introduce
16 Federal Rule of Evidence 408 does not mean in an evidentiary
17 hearing, it's any use in any court for any purpose. That's
18 what paragraph 2 says. Any use for any evidentiary purpose.
19 Now, an evidentiary purpose, Your Honor, is not an evidentiary
20 hearing, it is support for a position. They didn't cite the
21 negotiations and communications and give declarant support, I
22 swear that it's true, for a purpose other than to use it to
23 sway your mind. That's an evidentiary purpose, Your Honor,
24 whether it's an evidentiary hearing or not. There is not two,
25 three bites. One, we can do it if we're caught well, may --

1 then we'll argue about whether we should have done it. They
2 shouldn't do it in the first place. Otherwise, agreements
3 don't mean anything. That's where I'm coming from. That's
4 where the debtor is coming from. And, Your Honor, if what you
5 just said was the rule with all respect, your words from the
6 bench could be ignored and somebody could say, well, it's only
7 words, I'll try. That isn't the way we want to do things. Not
8 in this court, not in this case, not in this country. It's
9 wrong. That's where I'm coming from, Your Honor, and that's
10 where our estate is coming from.

11 THE COURT: Okay.

12 MR. GRUENBERGER: Thank you, Your Honor.

13 MR. REISS: Your Honor, Jeremy Reiss, Blank Rome, LLP
14 on behalf of Capital Automotive. With me today also is my
15 partner, Tom Biron, to my left. I'm going to try to proceed in
16 order with the questions you posed at the beginning of my fine
17 colleague's soliloquy there.

18 First, I think it's important to note that what we're
19 dealing with here is not a confidentiality agreement. We're
20 dealing here with an agreement which, if anything, limits the
21 use of the introduction of evidence. It does not say that
22 Capital and LBSF cannot tell others what were discussed during
23 these negotiations. It does not say we couldn't take out an ad
24 in the New York Times and say this is the position LBSF has
25 taken in regards to the settlement of our rights under the swap

1 agreement. That's an important point, because one of the
2 issues you raised is what is the -- if the negotiation
3 agreement has been violated, what is the remedy. And
4 certainly, I would say there is no remedy for -- there is no
5 availability of damages, no availability of injunctive relief.
6 We have done nothing that the agreement prohi -- we have not
7 done anything the agreement prohibits.

8 First, also to be clear, we do not want to litigate
9 this issue. Finally, yesterday after six weeks of trying to
10 ferret out exactly what LBSF was concerned about, exactly what
11 statements, it thought violated the negotiation agreement, they
12 were finally identified in the reply that was filed sometime
13 yesterday morning and now we have even further elucidation in
14 this trial binder, this hearing binder, that was just provided,
15 which gives us a little bit of more detail. And what is
16 important to note is that their position has changed in the
17 intervening six weeks.

18 At first, they said, let's strike the Statle
19 declaration. Let's strike the Rosenfeld declaration. And now
20 though identifies specific paragraphs. And our position has
21 been and continues to be that we are happy it wants LBSF
22 identified specific allegations that it thought were barred by
23 the negotiation agreement in some capacity. We were happy to
24 sit down with them and discuss whether those -- whether those
25 allegations were, in fact, barred, what that meant, and how we

1 could fix that.

2 My colleague, Mr. Biron, sent Mr. Slack (ph.) a letter
3 on December 4th and -- excuse me -- on December 7th in response
4 to an e-mail Mr. Slack had transmitted on December 4th
5 demanding we withdraw the objection and the declarations. Mr.
6 Biron sent a letter saying, "Please identify exactly what
7 you're talking about and we'll talk." We get it the day before
8 the hearing and, in fact, it is much narrower than the relief
9 they originally had demanded.

10 Now, the second question I believe he raised is
11 whether this was right for adjudication at this juncture. And
12 our position is is, no, it's not because as I noted in the
13 negotiation agreement is not a confidentiality agreement. It
14 does not bar us raising these allegations that are at issue.
15 All it prohibits, if anything, is that certain allegations
16 cannot be used as evidence.

17 Now, one of the things we have sought in our
18 substantive response in the motion to compel is that this
19 entire motion to compel that LBSF has brought is properly
20 brought through an adversary proceeding. And if it were, in
21 fact, re-filed as such, we would have -- we would have full
22 latitude to make these very same allegations even if they were
23 barred in their entirety by the negotiation agreement. We
24 would have the right to put them in a pleading because that is
25 not using them as evidence as that term is used in Federal

1 Rules of Evidence. That is an issue for trial. That is an
2 issue determined in motions in limine before trial. But I
3 would renew our point that we are happy to sit down with LBSF
4 and discuss how some of these issues could be resolved if there
5 is merit to their positions.

6 Now, another point that I think is very -- that we
7 just recently learned that is very useful is that this is
8 apparently a unique right on which LBSF is now relying. It is
9 not present, apparently, and other swap agreements or
10 negotiation agreements in connection with the resolution of
11 other swap agreement disputes. Accordingly, the overarching
12 policy concern that LBSF seem to be articulating in its papers
13 would appear to be minimalized vis-a-vis what they originally
14 seemed to posit it as.

15 I also just want to make one note. We do not concede
16 necessarily that Capital Automotive or its counsel drafted this
17 agreement in part. That may be the case; it may not be the
18 case. I can't speak to that today. I can't speak to whether
19 some specific language might have been added by LBSF or its
20 counsel just so that's clear that we have no conceded that
21 point, necessarily.

22 Okay. Now, let's turn to the merits of what's at
23 issue right now. I have three types of arguments. You know,
24 the first we'll call them situational, textural and practical.
25 I think I've already addressed the practical arguments. But

1 now turning to the situational arguments.

2 The reason we -- the reason Capital Automotive was
3 compelled to introduce these allegations into the papers, was
4 because of what LBSF itself put into dispute in this action.
5 Two things specifically I would note. In paragraph 29 of the
6 motion to compel, LBSF specifically noted the issues present in
7 its motion against Capital Automotive were, quote, "virtually
8 identical", unquote, to those in connection with a motion to
9 compel, performance under a swap agreement. LBSF lodged
10 against the Metavante Corporation.

11 Now, Your Honor, I'm sure recalls that dispute. And
12 central to that dispute was Metavante's conduct in terminating
13 or not terminating its swap agreement with LBSF. And I won't
14 go into detail of what happened in connection with that matter
15 but Your Honor recalls that Metavante apparently was trying to
16 time the market on when was the best time to terminate its
17 agreement. And I believe Your Honor may have believed there
18 was a little bit of bad faith inherent in that posture as well.

19 It was very clear given that LBSF alleged that the
20 issues were virtually identical to the issues that are present
21 here that we distinguish ourselves from the Metavante position.
22 Here, by contrast, almost immediately upon the occurrence in
23 event of default under the swap agreement, my client went out
24 and acquired a substitute hedge clearly indicating that it was
25 going to terminate that swap agreement.

1 Our client began discussions with LBSF as soon as
2 practical following its bankruptcy filing and the record as to
3 what happened after that is spelled out in Mr. Stattle's
4 declaration, Mr. Rosenfeld's declaration. The point simply is
5 that we are not a party who sat on our hands and waited for the
6 market to somehow change to perhaps put us in the money on some
7 kind of swap. We began from the original -- from the original
8 LBHI bankruptcy filing instead to begin planning for
9 substitutes, to begin planning for termination and LBSF knew
10 this.

11 The other reason we felt compelled to introduce some
12 of the specific allegations and the declarations such as the
13 amount of the settlement offers that were exchanged, was not to
14 demonstrate, not to try to pin LBSF on what the value of the
15 swap agreement was, but rather to show that Capital
16 Automotive's positions, Capital Automotive's settlement offers
17 were good faith offers. There was real money on the table.
18 There was fifteen million dollars on the table. There was not
19 offers of 200,000 dollars nominal pittances. This was real
20 money as evidencing a real attempt by our client to resolve
21 this dispute in early time.

22 Now, the other allegation that specifically puts at
23 issue our client's conduct is paragraph 32 of the motion to
24 compel which allege that Capital never attempted to terminate,
25 never attempted to accelerate or otherwise offset or net out

1 its position under the swap agreement. Again, I think the
2 conduct of Capital Automotive clearly belies that contention.

3 Even if, and I'm just assuming for sake of argument
4 now, even if these allegations were barred by the negotiation
5 agreement and barred at this time by the negotiation agreement,
6 we have analogized to the at issue waiver under the
7 attorney/client privilege, with cited cases under that doctrine
8 from this circuit which we believe would support the notion
9 that fundamental fairness sometimes overrides concerns such as
10 privilege information. It override concern such as a private
11 inter se a contractual limitation. You know, this is well
12 recognized. We have, for example, United States v. Bilzerian
13 from the Second Circuit where the Court noted, quote, "The
14 privilege may be implicitly waived when defendant asserts a
15 claim that in fairness requires examination of protected
16 communications." Here by analogy, examining LBSF's claim in
17 fairness requires examination of the entire factual picture
18 that's at issue here.

19 Turning now to the textual arguments, I'm not going to
20 quibble too much with the reading of the negotiation agreement
21 that LBSF has made except I'm going to point out the important
22 language they failed to note, which is that there is a carve
23 out of what the term "communications" means.

24 And the term communications specifically is defined to
25 not include, quote, "Any action, communication or statements

1 made by a party in connection with the party's enforcement of
2 its rights and remedies under the swap agreement or this
3 letter", that being the negotiation agreement.

4 Your Honor, respectfully, that is exactly what the
5 communications we have raised were. They related to attempts
6 by our client, by Capital Automotive, to enforce its rights to
7 terminate the swap agreement upon the occurrence of events of
8 default. Furthermore, it's broad to include not only
9 statements by Capital Automotive, but statements by LBSF that
10 relate to Capital Automotive's attempts to exercise its rights
11 under the swap agreement.

12 Now, we are not taking the position that this means
13 that any and all -- any and all statements made by LBSF could
14 be used for any purpose. That is not what we're saying at all.
15 We would concede, for example, that we could not use statements
16 concerning quantification of those rights as some kind of
17 binding evidence in this proceeding as it moves towards the
18 entry of facts into evidence. But certainly, the statements
19 that relate to the actual exercise of the rights themselves,
20 are carved out of communications under this agreement and thus
21 we think are not barred.

22 The only other point I would make, Your Honor, is
23 concerning Rule 408. We have not argued that Rule 408 somehow
24 is the governing standard here. We have raised Rule 408 to
25 note that if there is a policy concerning the exclusion of

1 settlement negotiations, of compromised negotiations from
2 evidence, that is the policy. The policy as our nation's
3 jurisprudence has enshrined it is evidence by Rule 408. And
4 that allows for the use of a lot of allegations for a lot of
5 different purposes. That to the extent the negotiation
6 agreement goes beyond that, it perhaps the reading that LBSF
7 has given it is out of line with what our jurisprudence deems
8 the acceptable and prudent limitations on the introduction of
9 compromised negotiations into evidence.

10 And one other point, just the Reuling case, which is,
11 I believe, the only case on which LBSF relies; two points I
12 would make concerning that.

13 The first is that unless I am incorrect, that case was
14 concerning motions in limine to keep evidence out as determined
15 prior to trial. It wasn't an attempt to strike some kind of
16 pleading lodged in the case that would have -- could have
17 broader substantive ramifications.

18 The other point is that in the Reuling case the
19 evidence in question was offered in the case in chief, the
20 evidence that was alleged precluded was offered in the case in
21 chief in an offensive way. Here, I would just remind the
22 Court, we are only attempting to use these facts, these
23 allegations, in a defensive manner and only because we are
24 compelled to by what LBSF has put at issue.

25 And finally in that case, there was also -- the Court

1 noted that the reason it was excluding the evidence in part was
2 because there was no separate wrong and there was no separate
3 purpose to which the evidence could be put other than trying to
4 prove liability on the primary claim, which is, again, not what
5 we're trying to do here with anything they've identified.

6 In short, to sum up, we are happy as we have said for
7 a month and a half now to discuss specific allegations, how
8 those specific allegations could be tempered with LBSF. And
9 now that the day before the hearing we were provided with the
10 allegations in question, perhaps we could do that. But
11 otherwise we would view this, their motion, as untimely and
12 substantively improper. Any questions, Your Honor?

13 THE COURT: I think Mr. Gruenberger wants to respond
14 to some of the things you've said.

15 MR. GRUENBERGER: Very briefly, Your Honor. I'm not
16 going to get into whether or not this has to be a
17 confidentiality agreement. That needs no response.

18 I think what you heard and what we all heard today is
19 exactly what we were afraid of. Not only are they trying to
20 use this in papers filed in court to win a motion, they're now
21 trying to sway Your Honor by using the negotiations themselves
22 against us to color your mind against us. That's more than
23 just reading it, now they're saying, we're good guys, they're
24 bad guys, let's look at the negotiations that we're not
25 supposed to refer to. That's what they're doing and that's

1 what this is all about.

2 THE COURT: I actually disagree with that. I think
3 that what I heard in argument is an attempt to differentiate
4 this situation from the situation that was litigated in
5 Metavante. And whether that's a fair use of the negotiating
6 history, I don't know, but I don't -- I don't draw the
7 conclusion that you've just asserted that they're trying to
8 paint Lehman as a bad guy. I think instead, they're trying to
9 paint themselves as endeavoring to reach an accommodation and
10 that it took some time.

11 MR. GRUENBERGER: Your Honor may draw that inference.
12 I respectfully disagree and maintain our position. I think the
13 position --

14 THE COURT: But let's understand what we're dealing
15 with here. That's one of the reasons why I asked some
16 threshold questions. With the -- mostly for courtroom, we've
17 spent a considerable amount of time debating an issue that is
18 clearly important but let's look at the context in which we're
19 debating it. This is not the Dartmouth College case. We're
20 not debating the sanctity of contract as an issue of seminal
21 law of the United States. We're talking about something that
22 really is a one-off agreement that I suppose Capital Automotive
23 now wishes it hadn't proposed in the first place. But you know
24 what, they did. This is not a governing issue in this case.
25 You've already acknowledged that all of these counterparty

1 negotiations are going on without such agreements in place
2 which means that negotiations without this agreement would be
3 before me in multiple cases.

4 MR. GRUENBERGER: That's correct, Your Honor. I --
5 you asked me a question whether this was the standard that the
6 debtors use and I said no. There are confidentiality
7 agreements, as you know, that come before you in other context,
8 but this is not the standard. But you heard counsel, when they
9 think that they can get away with making statements like, well,
10 we really don't know whether we drafted it, so we're not going
11 to agree or disagree. You notice that that was -- Your Honor
12 just said they drafted it. They walked away from that.
13 They're not agreeing with anything. They accuse me of not
14 mentioning the clause in the -- on negotiation agreement that
15 says that, yes, it's legitimate to try to use negotiations for
16 enforcement purposes. They're choosing to not mentioning that.
17 Your Honor knows I mentioned that and we don't have to go check
18 the transcript, it's all over that. And I mentioned that the
19 enforcement could not be possible because what they're trying
20 to do to enforce doesn't exist as a right under the swap
21 agreement. So I think this is a question of how slippery a
22 slope are we going to allow to be used here. They said that
23 the case was only an evidentiary case. The case we cite in the
24 District Court of Connecticut. That came up on a motion to
25 amend a pleading. The case is only three pages long, Your

1 Honor. It's not hard. I'm sure your clerk will read it. And
2 it's there. Whatever the case stands for, it stands for that
3 that use of negotiations was stricken. It wasn't permitted.
4 That's what we're talking about. How far can parties go
5 freely?

Of course, this is not the Dartmouth College case. Of
6 course not. Even I in my rhetoric don't go that far. Never
7 close.

8 THE COURT: You almost did. You almost did as you
9 were closing your argument. You were suggesting that this was
10 a case about the sanctity of contract.

11 MR. GRUENBERGER: And I still believe it.

12 THE COURT: That is in fact the Dartmouth College
13 case.

14 MR. GRUENBERGER: Yes, it is, Your Honor. But this is
15 only in a very small, small universe. That was in the 18th
16 century, Your Honor, at the start of this country. And when
17 Justice Marshall wrote that decision, he was writing on a clean
18 slate. We're not writing on a clean slate. Contracts meant
19 something after that case and they still mean something and
20 that's why I submit, Your Honor, that you should enforce it
21 against Capital Automotive. And I thank you very much for
22 giving me the opportunity.

23 THE COURT: Okay. Apparently, that's not the last
24 word.

25 MR. REISS: Your Honor, with your indulgence, one

1 point just on the Reuling case just so my reading of the case
2 is not besmirched; 407 F. Supp 2d, 401, 402 clearly identifies
3 that the issue was before the Court on a motion in limine.
4 That's all I have.

5 THE COURT: All right.

6 MR. REISS: Thank you.

7 THE COURT: It's lunchtime. It's actually twenty
8 minutes past lunchtime. And we have some other matters from
9 the morning agenda which will be heard at the start of the 2
10 o'clock calendar.

11 As it relates to this motion to strike, I'm going to
12 take some time to review the entirety of the negotiation
13 agreement not just the parts that have been excerpted although
14 I think if I read all the excerpts it's probably the whole
15 agreement. And I'm going to take this under advisement for
16 disposition if it hasn't become moot by that time on February
17 10 at the time of hearing, the motion to compel performance.

18 Notwithstanding the rhetoric, I question the need to
19 hear this motion to strike as a freestanding piece of motion
20 practice on an already crowded omnibus docket. And I need to
21 sift the relative importance of this issue in the context not
22 only of the dispute with Capital Automotive, but in the context
23 of the case as a whole.

24 I am left with the impression that this is
25 notwithstanding the characterization by debtors' counsel much

1 ado about not very much. I think it would be highly desirable
2 for the parties to meet and confer in good faith in accordance
3 with the proposal made by counsel for Capital Automotive to
4 endeavor to reach by consensus a molding of the pleadings and
5 the declarations to the obligations undertaken in the
6 negotiation agreement. To the extent that there can be a
7 rewriting of those declarations and a truncating of them in a
8 manner that makes them congruent with the agreement, that would
9 be desirable. If that can't be done, I'll deal with the motion
10 on February 10 as a motion in limine which is what I believe it
11 is.

12 There seems to be little dispute as I have heard the
13 argument that the language of the agreement says what it says,
14 that it's plain, that there's no ambiguity and that there's no
15 need as a result to get to the intention of the parties in
16 having prepared in the first instance. It does not purport to
17 be a confidentiality agreement but it does by its terms limit
18 use. The question that's still before the Court is whether the
19 use that has been made of the material set forth in the two
20 declarations constitutes a fair use of negotiation history
21 consistent with the terms of the agreement. I'll give some
22 thought to the analogy made to an at issue privilege waiver
23 which I view as something of a stretch, but I'll at least give
24 it some thought.

25 What it basically is is a plea for mercy by a lawyer

1 who represents a party that now wishes it didn't enter into a
2 particular form of agreement.

3 As Mr. Gruenberger has articulated with considerable
4 flourish, this is a contract. It should be enforced. But the
5 question still exists as to what it means and how it should be
6 applied in these circumstances. I'll do that if it's necessary
7 on February 10 but suggest with emphasis that the parties might
8 do well to take this problem away from me by reaching an
9 agreement before February 10 so we don't have to spend anymore
10 time on what I think is an unfortunately small point. We're
11 adjourned till 2 o'clock.

12 (Recess from 12:53 p.m. until 2:00 p.m.)

13 THE COURT: Be seated, please.

14 MR. WAISMAN: Good afternoon, Your Honor. Shai
15 Waisman, Weil Gotshal & Manges, on behalf of the Lehman
16 debtors.

17 Your Honor, as I indicated at this morning's session,
18 we filed an amended agenda letter last night reflecting that
19 two of the adversary proceedings, numbers 16 and 17 of the
20 prior agenda letter that were scheduled for this afternoon's
21 session, have been further adjourned. That left one adversary
22 proceeding to proceed this afternoon at the 2 o'clock calendar.

23 If we could, there is a request to proceed slightly
24 out of order as to that adversary proceeding. I understand the
25 parties have agreed on a discovery schedule and simply request

1 to hand up a stipulation, so it should be very -- a relatively
2 quick matter.

3 THE COURT: That's fine.

4 (Pause)

5 MR. ALBANESE: Good afternoon, Your Honor. Anthony
6 Albanese from Weil Gotshal, on behalf of the debtors.

7 This is the adversary proceeding of Federal Home Loan
8 Bank of Pittsburgh versus various entities and LBI, Woodlands
9 and Aurora Bank. We were before Your Honor on December 11th
10 with respect to all of the defendants' motions to dismiss the
11 proceeding. Your Honor had decided to defer the decision on
12 the motions to dismiss and allow the parties, at plaintiff's
13 request, to conduct discovery. And Your Honor indicated that
14 we could have sixty days for discovery.

15 So the parties have entered into a scheduling
16 stipulation which would provide that the discovery would be
17 completed by March 1st and that any supplemental papers with
18 respect to the motions that are pending would be submitted by
19 April 2nd and that any oppositions or objections to the
20 supplemental papers would be filed by April 19th. And all the
21 parties have agreed to the stipulation, which I can hand up to
22 Your Honor.

23 THE COURT: Sounds fine.

24 MR. ALBANESE: Thank you, Your Honor.

25 THE COURT: If it's as you describe, it's approved.

1 MR. ALBANESE: Okay, thank you.

2 THE COURT: And that can be handed when all matters
3 relating to the afternoon calendar are submitted.

4 MR. ALBANESE: Okay, thank you, Your Honor.

5 THE COURT: And everybody who's involved can go home.

6 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

7 MR. WAISMAN: Thank you, Your Honor. We would now
8 jump back to this -- the agenda for this morning, which we
9 didn't have an opportunity to close out. And I believe the
10 next matter on the calendar is reflected in agenda item number
11 10, motion of Sea Port and Berner to deem proofs of claim to be
12 timely filed.

13 THE COURT: Good afternoon.

14 MR. DONOHO: Good afternoon, Your Honor. It's
15 Christopher Donoho of Lovells LLP, on behalf of Sea Port Group
16 Securities, LLC and Berner Kantonalbank jointly. And the
17 reason it's a joint motion is these are buyers and -- a buyer
18 and a seller of some Lehman programs securities. And I think
19 from your nodding that you have read the papers and understand
20 that this is --

21 THE COURT: I understand the papers and I understand
22 that a mistake was made with respect to the second page of the
23 spreadsheet. And it hardly seems excusable, but let me hear
24 you tell me why it should be.

25 MR. DONOHO: Okay. Not a great start for me, but I --

1 THE COURT: No, it's --

2 MR. DONOHO: -- hope I can convince you.

3 THE COURT: -- it's not a great start.

4 MR. DONOHO: Well, as you -- well, let me start off by
5 saying that we are talking about three trades that were on that
6 second page; it's a total of a little bit less than five
7 million dollars of claim amount for those three trades in the
8 aggregate. And I'll go over briefly the facts for you,
9 although I won't belabor them because obviously you're up to
10 speed. But I would also note that Jonathan Silverman, who's
11 the general counsel of Sea Port Group, is here today. And on
12 the phone is Samuel Stucki of Berner Kantonalbank -- sometimes
13 we call them BEKB -- is on the phone as well.

14 And, I guess, taking it from sort of the brief
15 history, on September 4th there was the confirmation of the
16 trade; it was two separate pages, as you know: eight on one
17 page, three on the other. The eight -- well, essentially seven
18 of the eight closed a few days later, as was contemplated.
19 There was some confusion about a currency issue on the other
20 one; that then closed on September 30th. At that time, there
21 was -- sort of first raised the question of those other three
22 trades between the back offices, not involving the traders who
23 were directly involved. The BEKB back office said what about
24 these other three trades. The Sea Port back office said we
25 don't recognize those three trades.

1 And that -- it then just sort of fell into the ether
2 for a short period of time, when on November 5 the BEKB trader
3 contacted the Sea Port trader and said we have these other
4 three trades, we want to close on these, what happened. It was
5 then it was realized that, you know, that they had not closed
6 on those three trades and the November 2nd bar date had been
7 missed. I don't think that those facts are disputed by the
8 debtor, and I think they sort of speak for themselves.

9 But what I wanted to talk about was whether the
10 failure to file the proof of claim for those three securities
11 by the November 2nd bar date constitutes excusable neglect.

12 THE COURT: Let me ask you this question.

13 MR. DONOHO: Yeah.

14 THE COURT: At this moment --

15 MR. DONOHO: Yes.

16 THE COURT: -- who owns the securities? Was this a
17 failed trade, or did the trade go through and the proof of
18 claim fell between the cracks in the hands of the owner?

19 MR. DONOHO: It's a great question, and the answer is,
20 I think, unsettled. The claims have not -- the trade has not
21 closed. The seller would say that the obligation and the
22 ownership interest is in the hands of the buyer and it was
23 their responsibility. The buyer would say that, because it
24 never closed, the responsibility for filing the claim is in the
25 hands of the seller. That's an issue between the two of them

1 that remains unresolved. And the hope is that if there's a
2 favorable outcome from this late-filed claim motion, that that
3 issue will no longer be an issue and then it can close and
4 everyone will be happy. If we get an unfavorable result from
5 this joint motion, then that question becomes the core question
6 as between those two parties.

7 THE COURT: I'm glad I asked it.

8 MR. DONOHO: But it is the, sort of, key question,
9 because you have two parties who are getting along for purposes
10 of bringing this motion, but behind the scenes are both
11 pointing at each other saying this is your -- this is not our
12 fault, this is your responsibility. BEKB would say on their
13 records, their systems, once they have a trade confirmation it
14 gets a different coding, it gets treated differently and it's
15 treated as sold, and they don't keep records of it. The buyer
16 would say -- well, here it got mistaken, so it didn't get coded
17 that way. But the buyer would say until the trade closes we
18 don't have title, and without title we can't file a proof of
19 claim.

20 So you have this push and pull. And that's why I
21 say -- that's why this is such an important hearing, because
22 that issue will go away if we get a favorable result. That, to
23 me, is part of the prejudice argument of, sort of, the four-
24 prong test as it relates to excusable neglect. To me, the
25 prejudice issue sort of falls in, sort of, three categories;

1 one of them is just that. There's a five million dollar issue
2 that we're looking at, which will lead to litigation if this
3 isn't resolved. On the flip side, as to the Lehman estate,
4 five million dollars is below a rounding error, given the size
5 of the estate.

6 I think the other two points to make on prejudice --
7 the first one is that this five million dollars, being a small
8 amount for Lehman, is a lot for these parties and potentially
9 people's jobs are on the line. Like, this was a mistake that
10 someone is having to take responsibility for; they haven't had
11 to face that judgment, I guess, until we have a decision here.
12 But potentially, you know, there could be consequences. This
13 is real money for both the buyer and the seller.

14 The other point I guess I would make is that the
15 prejudice for a Lehman programs security, which this is, seems
16 that -- seems, to the movants, that these are the kinds of
17 securities that were known by the debtors. It's not like the
18 Pacific Life case, which you are obviously still considering.
19 But there you had a derivative with a guarantee claim, and it's
20 hard to say whether that guarantee claim was known, was part of
21 the books and records, was easily identifiable. These are
22 Lehman programs securities where there was a guarantee claim
23 form that was sent out and available. The existence of these
24 claims should have been very well known to the debtors. So
25 it's hard to see how it can be prejudiced by having those

1 claims allowed, which they were probably counting on being
2 filed.

3 The three other factors: Delay: We have a forty-two
4 day delay. As soon as this became clear that it was a problem
5 that was not going to resolve itself, we put the motion
6 together, filed the claims, came before this Court.

7 Good faith: I don't think anyone questions that --
8 everyone recognizes something terrible happened here, and
9 everyone's been acting in good faith to get this resolved.

10 The last factor, and we understand that they're not,
11 sort of, considered as equally weighted factors, is, sort of,
12 the reason. And I think the facts set forth the reason. But
13 what I wanted to do was really contrast this with some of the
14 other cases that either they've cited or we've cited or that
15 you are considering now. I think one of the cases that the
16 debtors cite is the Enron Midland Cogeneration case. I think
17 this is very different than that in the sense that there was a
18 six-month delay; people knew about, or should have known about,
19 the claim that they could have filed, and they really sat on
20 their rights. We don't have that here. We have people who
21 acted promptly; as soon as they became aware of the problem,
22 they acted.

23 I think the case that the debtors are really relying
24 on, and the one that's probably sticking with you, is Pacific
25 Life, where you have two people in the same institution, each

1 charged with the responsibility, one doing European claims, the
2 other one doing U.S. claims. You have a U.S. guarantee on the
3 European claim. Both people look at each other and say this
4 was your responsibility, what you referred to as the fly ball
5 that lands between the two outfielders.

6 And I think this is different, and the reason I think
7 it's different is those two outfielders play on the same team;
8 they're managed by the same coach. And that ball fell between
9 the two of them. Ultimately, the manager of that baseball team
10 had the responsibility to tell the center fielder, or the left
11 fielder or the right fielder, whose responsibility it is to
12 take control of the ball; that's an indeterminate.

13 Here you have two different organizations, BEKB, which
14 is a Swiss entity which doesn't normally trade in these kinds
15 of U.S.-type securities, and a U.S. entity that doesn't have
16 this trading partner very often, speaking primarily different
17 languages, dealing in securities that they don't spend a lot of
18 time with, and they have a mistake and the ball falling between
19 them, so to speak; they're on different teams and they have
20 different managers.

21 And so what I think was really underlying your concern
22 in Pacific Life is the manager of that baseball team had the
23 ability to control their actions and didn't do a good job of
24 it. And you haven't ruled against them, so I'm not saying
25 that -- I'm not trying to prejudice your decision there in any

1 way. But here you have a very different situation because you
2 don't have one manager; you have two different managers. And I
3 think this is a lot more like a situation like PB Capital or
4 Banesco where you have people doing their jobs as best they can
5 and making unfortunate slip-ups, but the consequences are so
6 dire on the one hand and so mild on the other hand that we
7 would hope that this would constitute excusable neglect.

8 THE COURT: I need to understand a little bit more as
9 to why the facts you have laid out, in what I'm afraid is a
10 tortured metaphor that I started last time we had a hearing
11 with the subject of excusable neglect, gets us to the point of
12 exercising discretion in your favor. It's one thing to pick up
13 the metaphor to have two players who see the ball and drop it;
14 it's another thing to have players who are drinking coffee in
15 the dugout. Here, we have players who are closer to the second
16 imagery. They didn't see it. In fact, they weren't even
17 looking. They weren't playing. They didn't know that there
18 were three securities on this second spreadsheet.

19 So in some ways you can say it's a harder case for
20 you, because there isn't even an effort at diligence. There is
21 knowledge of the bar date on the part of both seller and buyer
22 but a failure to recognize that these are securities that
23 either party needs to attend to for purposes of preserving
24 rights. I'm troubled by that.

25 MR. DONOHO: I -- I don't know that it's laid out

1 expressly in the affidavit in a way that addresses your
2 question, but I think it's implicit in the affidavits that this
3 is an unusual situation, these are unusual circumstances. And
4 I can sort of flip that into two categories. First off, I
5 don't think the seller has much experience in U.S. bankruptcy
6 matters and understands the idea of who has the responsibility
7 for filing claims. And they coded these securities, once they
8 had the confirmations, as sold. So in their minds, they were
9 aware of them; they just didn't know that they were
10 responsible, or could be responsible, for filing claims.

11 On the other hand, you have a buyer who doesn't -- you
12 know, doesn't -- didn't have that extra layer of check to make
13 sure that every time a trader gets a two-page spreadsheet page
14 of securities that both pages make their way through. I am --
15 you know, I am -- I understand that this kind of thing doesn't
16 happen. And so this is so unusual that to have the, sort of,
17 requirement that they have this extra layer of protection built
18 into their own system is sort of what I think you're saying
19 should have been there. And they don't have that; maybe they
20 will after this, but they didn't have it in place at the time.
21 And so the ability to correct for those kinds of mistakes just
22 simply wasn't there.

23 And, again, I don't think this is so different
24 ultimately than PB Capital or Banesco in the sense that in
25 those situations where you ruled in their favor, someone either

1 misread the form or saw the list of securities, saw they were
2 on there, and didn't go back and check the second time when the
3 new list came out. In both of those instances, someone could
4 have discovered it but didn't because either they misread it or
5 they didn't follow up. And I think that's no different,
6 really, ultimately than what we have here where you have a
7 seller who mis -- potentially misinterpreted their
8 responsibility, and a buyer who didn't follow up because they
9 haven't had the experience that tells them you need to follow
10 up.

11 THE COURT: I guess here's the distinction in my mind:
12 In the other two examples, there were parties who were
13 scrupulously endeavoring to comply with the bar date and
14 exercising due diligence, but there was a mistake, and the
15 mistake in both instances occurred within highly respected law
16 firms that were doing the best they could under the
17 circumstances to get a job done by a hard deadline that they
18 recognized.

19 In this instance, there seems to have been -- whether
20 it's excusable or not we'll have to get to in a minute -- a
21 failure to recognize the obligation. There was a failure to
22 recognize the obligation on the part of the seller because it
23 was coded as sold. So even though there -- and I have no idea
24 what this institution's knowledge of U.S. bankruptcy practice
25 may be. And, frankly, even if it were sophisticated in U.S.

1 bankruptcy practice, the Lehman case is, for all practices
2 cases, sui generis as it relates to the proof-of-claim drill,
3 particularly as it affects securities.

4 So I have no idea what they did, except they didn't do
5 anything because they didn't think there was anything to do,
6 because they'd sold the securities.

7 MR. DONOHO: Your Honor, a response that I think
8 answers that question is these are not parties who were acting
9 carelessly. As the debtor notes in its pleading, both BEKB and
10 Sea Port filed proofs of claim on their own behalf in other
11 instances with respect to other securities. So they were aware
12 of the bar date, knew their responsibility and acted in
13 accordance with that. This is the exception to that where,
14 again, for the reasons they set out, either they didn't know it
15 was their responsibility or they didn't realize they had it to
16 do. But it wasn't like they were flaunting this Court's order
17 that says you have to do.

18 THE COURT: No, I'm not suggesting for a minute that
19 that's what I think happened. I'm really talking about a blind
20 spot. I'm talking about something that's completely missed.
21 It's the intersectional collision and you didn't see the stop
22 sign at all, but the stop sign was there and you had a
23 collision, but you're at fault. It doesn't mean that you
24 wanted the accident to happen; it's that you were texting or
25 doing something else, your mind was elsewhere.

1 And, again, this may not be a completely apt image,
2 but my image of this is that the seller didn't even think about
3 filing a proof of claim as to the securities, for the reasons
4 that you've described, because the securities were, for their
5 records, sold. As a result, it was, in their mind, the buyer's
6 responsibility to do whatever needed to be done to protect
7 claims as against this estate. And from the buyer's
8 perspective, they didn't see the second sheet. Now, the second
9 sheet was there to see, the securities on the second sheet were
10 part of this eleven-security trade, but because the second
11 sheet was missed it's as if they weren't there at all.

12 So the real mistake, I guess, we're talking about is
13 the buyer's back-office mistake in missing the sheet and in
14 failing to pick up the fact that mistake was made. That's how
15 I'm seeing it.

16 MR. DONOHO: Your Honor, I guess I don't fundamentally
17 disagree with the facts as you lay them out; it's really a
18 question of degree. And I know you haven't ruled in Pacific
19 Life, and I know you have ruled on PB Capital and Banesco, but,
20 to me, in PB Capital and in Banesco you have something that
21 could have been caught, but either they didn't read it closely
22 enough or they had a misunderstanding or they didn't look at it
23 at the right time. In each case they were acting in good
24 faith; they just made a mistake.

25 And I would say that in this situation, you have --

1 obviously the facts are different, but the good faith, the lack
2 of prejudice and the effort, I think, was all there. And,
3 again, they acted very promptly to respond.

4 And I think one other point I guess I would make, and
5 you're going to say this isn't quite what you were asking me
6 but I didn't want to miss this point: I think one of the other
7 factors on prejudice is the sort of -- the fear of the flood,
8 right, the other claims that come in front of you. But from my
9 understanding, you've had six or so motions to allow late-filed
10 claims and a host, and maybe there are hundreds, of claims that
11 were late-filed. I don't know where those people are, but they
12 should be here in front of you on motions to have late-filed
13 claims if they believe they have good grounds to do so.

14 You have six movants who came in front of you saying
15 we made a mistake. I don't think that allowing this claim,
16 under these circumstances where people's jobs are on the line
17 and you're talking about a rounding error in a case of this
18 size is going to lead to the flood that's going to cause this
19 Court to be stuck with lots of people coming in and saying me
20 too, me too. Their chance to file motions really has come and
21 gone. We acted as promptly as we possibly could under the
22 circumstances. And, again, I don't think the prejudice is
23 there.

24 And I know that the factors aren't weighted equally,
25 but here the prejudice on the movants' side is so great

1 relative to the size of the estate and the facts at play, it
2 has to be considered.

3 THE COURT: Okay.

4 MR. DONOHO: Thank you, Your Honor.

5 THE COURT: I understand your argument, and I should
6 hear from Lehman.

7 MR. WAISMAN: Your Honor, Shai Waisman for Lehman. I
8 think what we've just heard is a very understandable and
9 laudable slight of hand embracing as vigorously as possible
10 Banesco and PB Capital and running away as much as possible
11 from the facts of Pacific Life. Of course, we view the world
12 very differently.

13 And to further torture Your Honor's analysis --
14 analogy in the baseball context -- you know, they weren't just,
15 in this context, sitting in the dugout drinking coffee. Here
16 they kind of actually pointed at the ball till it dropped on
17 the ground, left, and didn't pick up the ball till the very
18 next game.

19 Both parties here don't deny they received actual
20 notice of the bar date. What happened was this second page
21 didn't go through and Berner's back house contacts Sea Port and
22 says urgently there's a mistake here, you need to get to us
23 because there's an error. And what happens? Nothing. Nothing
24 happens until Berner goes at them again and says you need to
25 get back to us. And then people realize something went wrong,

1 and then they take an additional -- I think it's over thirty
2 days; it's set forth very clearly in the affidavits -- to
3 actually consider filing a proof of claim. And where we end up
4 is that Berner, who at all times, it's not admitted on the
5 record, owned the security, blows past all the bar dates and,
6 well after the securities program bar date, determines to file
7 a proof of claim.

8 It owned the securities as a result of the mix-up on
9 the trade. It owned the securities before the bar date, at the
10 bar date, to this day -- in response to Your Honor's question,
11 to this day, owns the securities, and offers really no excuse
12 as to why it did not file a proof of claim. And not
13 understanding the procedures doesn't excuse one from the
14 Court's bar date order, especially since it was so explicit.

15 And all of the commentary on the record that everyone
16 acted as soon as they realized that there was a mix-up in the
17 transfer of securities is completely unsupported by the two
18 affidavits, which make clear that people sat around. They knew
19 there was a screw-up in the transfer; they sat around. They
20 knew they missed the bar date; they still sat around. And to
21 this day we haven't heard any excuse for that.

22 And there's -- an argument's been made that, well, it
23 really doesn't matter because at all times Lehman knew about
24 these securities. Well, at this point that's not really
25 relevant. If Your Honor recalls, the reason we established the

1 programs securities bar date was because these were securities
2 that Lehman, Lehman the estate, the entities before Your Honor,
3 actually didn't know. These were issued by affiliates in
4 foreign proceedings, and we had no record.

5 So we had to give more time to prepare a list, set
6 them out and encourage people to file claims, and that's what
7 was done here; these were the B.V. notes which were guaranteed
8 by LBHI. But they got the benefit of a later bar date. And to
9 say that "They were known to us" doesn't excuse them from
10 failing to file even by the later bar date that these
11 securities provided.

12 I think we're getting -- I'm sorry, going back to
13 Banesco and PB Capital, as I recall Your Honor's reactions to
14 those matters, Your Honor first of all was very, I think, aware
15 and appreciative of the fact that, as Your Honor just said,
16 everyone had their eye on the ball, they were working
17 diligently. I think there was also an element there of
18 confusion over several bar dates and very detailed procedures
19 as to each of those bar dates. And the confluence of those
20 two, I feel, persuaded the Court that those parties had
21 established excusable neglect.

22 That is very different from the circumstances in
23 Pacific Life, and now in Sea Port, where there isn't even an
24 allegation of confusion over the procedures; there isn't any
25 confusion over the bar date. It is we missed the bar date

1 because we did not follow the instructions that were provided
2 to us, that we had full knowledge of, and it's because of an
3 error on our end, not the debtors' end, on our end, and because
4 we messed up, and there's a whole host of reasons we did, and
5 we interact with other parties all the time, and it's all very
6 confusing, and, by the way, it's an exception because no one
7 else will be like us; that doesn't cut the mustard.

8 The line of cases in the Second Circuit, I think, make
9 clear that the standard is strictly construed in this circuit.
10 And mere neglect -- and I'm not sure this is even mere neglect;
11 I think the absence of action during both intervening periods
12 rises beyond mere neglect in this case -- I think, precludes
13 the relief sought.

14 THE COURT: What do you say about the flood?

15 MR. WAISMAN: What I say about the flood, you know, we
16 didn't push the flood argument with respect to the last several
17 motions; we still don't push the flood argument. We merely
18 apprise the Court of how many late-filed claims there were.
19 But the flood was used very interestingly in the presentation.
20 It wasn't, well, there's no prejudice, there is no flood, so
21 that weighs in our favor. In fact, the argument was, as I read
22 it, there hasn't been a flood, we're here early and therefore,
23 no matter what the reason is, we get to file a late claim.
24 That isn't the standard. I think it's quite the opposite. If
25 you establish the basis for a late claim, you then consider the

1 flood argument. And I think here it was turned on its head.

2 And if we permit this late claim on these specific
3 circumstances, we essentially are left simply to any further
4 motion. Well, how many days after the bar date do they come?
5 Because at this point the reasons don't really matter. At this
6 point, if you made an error on your end, not because you didn't
7 receive notice and not because you didn't understand but you
8 just messed up, back office, two people didn't speak to each
9 other, you didn't follow any sort of procedures to make sure
10 your claims were transferred, you stuck it in a drawer and
11 forgot about it and just found it -- those are all perfectly
12 fine reasons if we accept this rationale -- at that point we're
13 just going to be counting days on a calendar as to how far away
14 we are from the bar date and whether the timing is -- you know,
15 has gotten beyond us.

16 And at this point we stand here nearly 120 days after
17 the original bar date; I think it was a little over 70 days
18 from the securities program bar date. There was even, in terms
19 of timing, a delay in the bringing of this motion. So I'm not
20 sure it cuts in their favor. But in any event, the prejudice
21 flood argument is not as set forth in Sea Port's presentation.

22 THE COURT: Okay.

23 MR. WAISMAN: Thank you.

24 THE COURT: Mr. Donoho, do you have some more?

25 MR. DONOHO: Just very quickly to clarify on a couple

1 of points. I guess I take offense to Mr. Waisman's opening
2 comment that this is somehow a slight of hand. I think, if
3 anything, this is a fairly candid admission that something
4 terrible has happened and we're trying to correct it. We've
5 been very open and honest about it.

6 He also refers to an absence of action. I don't think
7 there was any absence of action. I think people acted as
8 rapidly as they could once they realized there was a problem.

9 And his reference to looking at today as the reference
10 point for how far we are past the bar date is really unfair.
11 The claims were filed on December 14th; the motion was brought
12 on December 11th. Those are the dates you should be looking
13 at, not from today.

14 We acted as fast as we could; we were just working
15 within the Court's calendar. We didn't want to bring this on,
16 an order for shortening time. We didn't think that was a good
17 use of the Court's calendar. Thank you, Your Honor.

18 THE COURT: Okay.

19 When I looked at this motion in connection with
20 preparing for today's omnibus calendar, I recognized that there
21 were some overlaps with the Pacific Life case that has been
22 referenced during the argument. Because the Pacific Life case
23 is still under advisement, I'm going to take Sea Port and
24 Berner's motion and place it in the same spot, but it's not
25 going to stay there all that long. I think it's actually

1 helpful to the process of attempting to identify some
2 benchmarks for excusable neglect, in the context of a proof-of-
3 claim process that is here so complex, to have a couple of
4 examples to consider at the same time.

5 I'll be deciding this probably at the February 10
6 omnibus hearing date. And to the extent that someone would
7 like to advise Pacific Life, if they're not monitoring the
8 case, that they'll likely have an adjudication at that time, I
9 would appreciate debtors' counsel doing that. If for some
10 reason there's a change in plan because of workload or other
11 reasons, I'll let you know, but otherwise let's assume that
12 there'll be a decision on both of these pending matters at that
13 time.

14 MR. DONOHO: Thank you, Your Honor.

15 MR. WAISMAN: Thank you, Your Honor. And truly,
16 truly, no offense meant by "slight of hand" to my esteemed
17 counsel, honestly; more meant to emphasize trying to draw lines
18 between the various other motions that had been filed and
19 decided or adjourned by the Court.

20 THE COURT: Okay.

21 MR. WAISMAN: Next matter on the calendar, Your Honor,
22 appears at number 11: motion of the debtors for establishment
23 of procedures for the debtors to compromise and settle pre-
24 petition claims asserted by the debtors against third parties.

25 As Your Honor is well aware, this was a global

1 enterprise with a very large presence in the U.S. The debtors
2 conducted a great deal of business and had many customers and
3 vendors with whom they dealt with on a daily basis. The
4 debtors have identified certain claims they have against third
5 parties, and continue to identify those claims. Most recently,
6 Your Honor may be familiar with a stipulation entered into
7 between the debtors and LBI on the pursuit of certain pre-
8 petition loans to employees, just one category of the type of
9 claims against third parties that these debtors would proceed
10 with.

11 Given the de minimis amount of some of those claims,
12 any recovery would be severely diminished, if not entirely
13 diminished, by the need to prosecute individual motions with
14 respect to each. And as a result, the debtors proposed and
15 worked hand in hand with the creditors' committee to prepare
16 this motion outlining procedures by which they can settle pre-
17 petition claims, and I think the procedures are rather
18 explicitly set forth and rather standard.

19 One objection was filed prior to the January 6 expiry
20 of the objection deadline, and that was U.S. Bank's "limited"
21 objection. I found it difficult to discern how it was limited.
22 In reading the objection, it in fact suggested that none of the
23 relief was warranted and that, in particular, any settlement
24 that may affect any trust requires a motion on notice with an
25 opportunity for all creditors to respond, quite contrary to the

1 spirit and purpose of the motion.

2 I am at a loss as to what the aim of the objection was
3 if U.S. Bank as trustee, as we set forth in our reply, has
4 rights vis-a-vis the beneficiaries of trusts pursuant to the
5 documents underlying the trust. Those agreements remain in
6 place and they have whatever rights they have. The debtors, to
7 the extent they even have claims against U.S. Bank or any of
8 the beneficiaries of a trust, would be negotiating directly
9 with those parties. And the rights those parties have vis-a-
10 vis one another are governed by whatever agreements and
11 documents govern those relationships and should not be an
12 impairment to this administr -- the administration of this
13 estate being efficient and cost-effective, as well as not a
14 burden to the Court's docket.

15 I do note that the U.S. Bank objection did make clear
16 that the end game of any settlement and motion that would be
17 required, as per U.S. Bank's view, would require an exculpation
18 of U.S. Bank, and perhaps that was the motivation for the
19 objection.

20 With that, there were no other objections. I know --
21 I believe U.S. Bank is here. I'll cede the podium.

22 THE COURT: Fine.

23 MR. PRICE: Good afternoon, Your Honor. Craig Price
24 from Chapman and Cutler, on behalf of U.S. Bank.

25 First of all, I'd like to apologize for any confusion

1 we have caused to debtors' counsel and to the Court with our
2 papers, but I think our objection was a limited objection.
3 U.S. Bank is the trustee to over 800 complex -- I'm not going
4 to repeat the entire papers.

5 THE COURT: No, it's not that. What is a limited
6 objection? I don't even know what a limited objection --

7 MR. PRICE: Well, I think --

8 THE COURT: Isn't an objection an objection?

9 MR. PRICE: It's an objection, but it's limited in
10 scope.

11 THE COURT: You're trying to make it seem like it
12 wasn't a really --

13 MR. PRICE: It's not --

14 THE COURT: -- hard-nose --

15 MR. PRICE: No, no, right.

16 THE COURT: -- hard-fighting, bare-knuckled objection?
17 It's kind of a soft objection?

18 MR. PRICE: Well, it's limited in the sense that, you
19 know, we're fine with the settlement procedures that the
20 debtors have put forward; we, in fact, encourage it. We don't
21 want to hinder that process. In fact, we'd like to settle some
22 of our own claims. So it's not an objection to any
23 settlements. But we think that the claims that they are
24 attempting to settle are quite broad. We don't know exactly
25 every kind of claim that's covered by it.

1 So U.S. Bank is a gatekeeper for its beneficial
2 holders as well as itself. We're just asking that, to the
3 extent that there are any claims that are related to a U.S.
4 Bank trust, which is, you know, a small world of potential
5 claims, that those -- that any settlements with regard to those
6 claims -- that we're provided notice and a meaningful
7 opportunity to review the settlement just to make sure that
8 other beneficial holders are given the rights and that, you
9 know, we can look at the documents and make sure that
10 everyone's rights are maintained.

11 I think it's a quite limited-in-scope objection.
12 That's what we're asking is that, to the extent it's related to
13 an indenture or any other type of agreement or document that
14 U.S. Bank is the trustee to, that we're provided notice of that
15 settlement and that we're given an opportunity to review it and
16 make sure that everyone that would be affected is at the table.

17 And so that's, I think -- I don't know if that
18 answered your question about why it's a limited objection, but
19 it's quite narrow in scope.

20 THE COURT: It sounds like it's narrow, as you
21 describe it, but my interpretation of it is that it's
22 incredibly cumbersome in its potential application and of no
23 particular value. If in fact people do get notice, what are
24 they supposed to do with it? We're talking about recreating a
25 process that from the very beginning of this case was one where

1 individual creditors were stepping forward for 2004 exams for
2 the rights to be heard with respect to basically everything
3 that was going on at the time, and the creditors' committee
4 ended up as the principal clearinghouse for creditor concerns.

5 To the extent that there is some requirement that U.S.
6 Bank as trustee, as opposed to any other trustee, or as opposed
7 to any other party-in-interest who might be affected, is
8 somehow entitled to special notice, to me, is a curiosity and I
9 don't understand it. So maybe you could explain why that's
10 necessary --

11 MR. PRICE: Well, it's necessa --

12 THE COURT: -- why you as opposed to any other
13 fiduciary, why you as opposed to any other party-in-interest.

14 MR. PRICE: Well, I guess us because, one, we're here.
15 But, two, you know, U.S. Bank is just trying to perform its
16 functions as a trustee and make sure that all beneficial
17 holders are given the rights that they're entitled to.

18 And so, you know, the question of whether that should
19 be granted to all trustees, I can't answer that question. But
20 we think that it's part of our role to look at the -- any type
21 of agreement that's made with the beneficial holders, to make
22 sure that those rights are spread across everyone equally and
23 everyone is treated fairly and equally. And that's what we see
24 as our role and our job.

25 THE COURT: Okay. I just don't understand how it's

1 going to work, but maybe if the debtor's willing to do that,
2 that's, I suppose, okay.

3 MR. PRICE: Well, I don't think they're willing to do
4 it, so --

5 THE COURT: Well, I'm not surprised.

6 MR. PRICE: -- because -- that's why we're here.

7 THE COURT: So let me find out why they don't want to
8 do it.

9 MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank
10 Tweed Hadley & McCloy, on behalf of the official committee of
11 unsecured creditors.

12 Just rising to confirm that we did in fact work hand
13 in glove with the debtors on this and believe that the
14 procedures, as proposed, are entirely appropriate. They're
15 consistent with other procedures that have already been entered
16 in this case that have proven effective to permit the committee
17 to review settlements and other transactions of this type.

18 And we too are puzzled by U.S. Bank's objection. I
19 think it goes so far as to suggest that the thresholds which
20 are integral to the protocol be eliminated, which would
21 eviscerate the whole point. The whole point here is to allow
22 the debtors to settle some things entirely on their own and
23 some things in cooperation with us, and only need to get to you
24 at a twenty-five million dollar level, which we believe is
25 entirely appropriate.

1 So we think that objection should be overruled and the
2 motion entered as proposed.

3 THE COURT: Okay.

4 MR. WAISMAN: To answer Your Honor's question, we
5 can't agree. First, we don't understand -- I don't understand
6 what may or may not affect a trust; I don't understand what may
7 or may not affect U.S. Bank.

8 Secondly, the -- secondly, it would be impossible to
9 police; we would have to get into the essence of every single
10 one of these settlements that we would rely heavily on the
11 businesspeople to keep down the administrative costs of this
12 estate; we would have to get involved and figure out whether
13 they have the potential of effecting a trust.

14 And thirdly, as I think counsel was basically saying,
15 they would like to police all settlements. Well, you know, I'm
16 not sure that that's appropriate or the estate's problem. If
17 we enter into a settlement with a beneficial holder, and that
18 beneficial holder was supposed to tell the other beneficial
19 holders or was supposed to tell the trustee under the
20 indenture, well, those parties have rights one against the
21 other and that does not involve the estate and should not hold
22 up the administration of the estate.

23 MR. PRICE: I would just add, Your Honor, we're not
24 trying to eviscerate this process. I mean, we want it to go
25 forward. We're just concerned with those particular claims

1 that are being settled that relate to a trust that's being
2 administered by U.S. Bank.

3 And to the point that it's impossible to know which of
4 these involves U.S. Bank, I mean, U.S. Bank's name is all over
5 these documents. So to the extent that they were settling with
6 a beneficiary, it would be in the documentation that U.S. Bank
7 was the trustee.

8 I don't think it's an impossible burden for the
9 debtors to police or to inform people to the extent that it's
10 U.S. Bank that's being -- that's involved. We need to give
11 them notice. And we're not trying to police all settlements;
12 we're only, one, trying to police those that involve U.S. Bank-
13 administered trusts.

14 And to the extent that, you know, we review the
15 settlement agreement and all parties that should be there,
16 their rights are being protected, we're fine with no Rule 9019
17 motion being filed; it doesn't need to be. But to the extent
18 that there are instances where someone's rights, who is not at
19 the table, is being affected, then -- and there are objections
20 to that, then we would inform the debtors and we would hope,
21 then, that 9019 motion would be filed.

22 So, you know, it could be that there are no claims in
23 this world of the -- that relate to a U.S. Bank trust, and it
24 could be two. We just feel that in those instances they should
25 contact us, give us notice and so that we can perform our job,

1 our function.

2 THE COURT: The objection, limited or otherwise, of
3 U.S. Bank is overruled and the motion is granted. Based on my
4 review of the motion, the comments of the creditors' committee
5 that participated in developing these procedures with the
6 debtor, and the debtors' papers and argument made today, I am
7 satisfied that these procedures, particularly in the context of
8 this case, are appropriate and that no single party-in-
9 interest, whether a trustee or otherwise, should have special
10 rights of oversight in connection with these procedures.
11 Indeed, the procedures are designed to eliminate the need for
12 such administrative oversight for those settlements that fall
13 within certain predetermined ranges of materiality.

14 U.S. Bank National Association, as trustee, will
15 simply have to be as vigilant as it thinks it needs to be to
16 protect its beneficiaries in the various matters in which it
17 has an interest. And I don't believe that U.S. Bank is
18 entitled to any more rights, even though they filed a limited
19 objection, than any other comparable fiduciary in this case.

20 MR. WAISMAN: Thank you, Your Honor. I believe the
21 final matter on the calendar this afternoon is item number 12
22 on the amended agenda letter: debtors' motion for approval of
23 claim objection procedures and settlement procedures.

24 As Your Honor is well aware, all of the bar dates have
25 now passed. In response, over 65,000 claims have been filed

1 against these estates, and the debtors are preparing to embark
2 on the claims resolution process. We have filed, and will
3 continue to file, additional pleadings in order to streamline
4 the claims process that we feel would otherwise overwhelm our
5 resources as well as the resources of the Court, and this
6 motion is one of those meant to streamline the process.

7 Also, as indicated in Mr. Marsal's state-of-the-estate
8 presentation, I believe, at the last omnibus hearing, we do
9 hope to shortly file alternate dispute resolution procedures
10 for all of the claims that have been filed, or a large subset
11 of those claims.

12 But getting to the motion at hand, Your Honor, this is
13 what is somewhat routine in this and other districts, a motion
14 for authority to file omnibus objections on the grounds set
15 forth in the Bankruptcy Rules as well as additional grounds.

16 When we filed this motion we were somewhat surprised
17 but, as the docket reflects, received a number of calls and
18 concerns. And we worked with many of the parties that are very
19 familiar to this Court in these cases to try and reach an
20 accommodation and resolve any concerns. And, really, if I was
21 to summarize, I think many of the concerns stemmed from a
22 concern or wanting to assure that no one was going to be
23 essentially playing a game of Gotcha with claimants. And as
24 Your Honor is aware, that's not the way these debtors have
25 conducted themselves, nor intend to conduct themselves.

1 So in an effort to assuage concerns, and as reflected
2 in the blacklined order that was filed with our reply yesterday
3 afternoon, we've made a number of really, in our view,
4 clarifications to the order, which helped, I think, avoid a
5 number of objections and led to at least six of the objections
6 subsequently being withdrawn as well.

7 And the clarifications, first of all, go to the fact
8 that nothing in the motion, the proposed order or the notice
9 was or is intended to change the evidentiary burdens with
10 respect to proofs of claims, as those burdens are established
11 by the Rules and case law. Nothing in the motion or the
12 proposed order is meant to or intended to or will prejudice any
13 counterparty's rights to discovery under the applicable
14 Bankruptcy Rules, or to use documentation obtained or located
15 in discovery subsequent to the filing of a response to a claim
16 objection in a contested matter over a claim.

17 Specific modifications to the additional permitted
18 grounds included that if the debtors were to interpose
19 colloquially what's referred to as a books-and-records
20 objection, we would of course, as is routine and as was the
21 intent, include the amount of such claim as reflected in the
22 debtors' books and records. Similarly, if we interposed an
23 objection that the debtors had no liability for a given claim,
24 we would include the legal basis for such objection.

25 A number of objections also went to the response time

1 by which parties had to respond to a claims objection. The
2 Rules require that a hearing on a claims objection be set no
3 sooner than thirty days after the objection has been filed, but
4 do not set out the response timetable. We proposed, in the
5 motion, to establish a twenty-one day response deadline. And
6 after speaking to many of the parties, we have revised that to
7 a thirty-day response deadline.

8 With those modifications and representations, we were
9 able to avoid many objections and resolve a number of
10 objections. There remain, I believe, ten outstanding
11 objections, as reflected in the amended agenda letter.

12 Your Honor, because of the robust calendar this
13 morning and the need to adjourn this matter to this afternoon,
14 we had a bit of a conflict with some of the parties that
15 objected and that had hoped to be heard by the Court but had
16 other conflicts. And in order to accommodate them, I think
17 we've reached an agreement, with all of the remaining
18 objectors, that would permit this Court to enter the proposed
19 order.

20 And as to the ten remaining objections, those in
21 essence would be carried to the February 10th hearing, meaning
22 that the objections as filed are on the record, all of the
23 parties' rights as reflected and objections as reflected in
24 what they filed are preserved, and until a further order of
25 this Court or resolution between the parties, the debtors would

1 not object under the additional grounds with respect to any
2 claims filed by those ten objectors.

3 But as to the universe of claims filed against the
4 debtors, excepting those filed by these ten objectors, we would
5 be able to proceed on all of the grounds and in the framework
6 set forth in the revised proposed order.

7 THE COURT: If I understand what you have just said,
8 as to the ten objectors, this order to be entered today,
9 without objection, will have no application, but it's only as
10 to these objectors. And if the objectors are successful, and
11 this is really my point, at the next hearing in persuading me
12 that they're right, does that mean that there'll be an amended
13 order that will apply to everybody, or simply an amended order
14 that will apply as to them?

15 MR. WAISMAN: It would be an amended order that would
16 apply to them and them only. And the order that would be
17 entered today would, from today forward, apply to all other
18 claims that have been filed.

19 THE COURT: All right, well, that's fine, although I'm
20 going to reserve the right to amend the order that's entered
21 today if one of the objectors that I haven't yet heard from is
22 particularly eloquent and capable of demonstrating that the
23 order that has been entered includes some anomalies that should
24 be fixed for the benefit of all, not just for their client.

25 MR. WAISMAN: Okay. That puts us in a bit of an

1 awkward situation, Your Honor. The debtors were prepared to
2 proceed today, and in fact have omnibus objections prepared,
3 because we are eager to get the claims objection process
4 underway.

5 THE COURT: It won't affect anything --

6 MR. WAISMAN: It was an accommodation --

7 THE COURT: It won't affect anything that's been
8 started. I view this phase of your motion as administrative in
9 nature and expanding, as is permissible, the scope of omnibus
10 objections, both as to the number of those objections from 100
11 to 500 and as to the categories of claims that can be subject
12 to broad-based objection. I also consider that the notice
13 procedures that you have outlined in your motion, providing
14 particularized and targeted notice to individual claimants,
15 represents, if anything, an improvement over what has become
16 standard practice in providing omnibus objections to claimants
17 who then have to come through fairly thick documents to figure
18 out where in the document their claims are addressed.

19 So I don't have any problem with the procedures, as I
20 understand them, that are currently the subject of the order
21 you proposed. I'm simply suggesting that, from a prospective
22 perspective, if it turns out that there is some adjustment that
23 an objector is able to persuade me should be made, it won't
24 just be in my view something that will apply as to that single
25 objector but something that should have classwide application.

1 MR. WAISMAN: Understood, Your Honor. I guess, two
2 clarifying points: First, and not in the nature of an argument
3 to the Court but perhaps a plea to the remaining objectors, as
4 Your Honor just noted, we actually spent a great deal of time
5 and tried to make sure that the notice to be provided as to
6 objections would be particularized. In essence, we would
7 proceed by omnibus objection, but really it would be as if we
8 were filing one-off objections. And given that we could file
9 those one-off objections on our additional permitted grounds if
10 it was a one-off as opposed to an omnibus, and we're providing
11 personalized notice, you know, really the relief requested is
12 not such a far stretch, putting aside the routine nature of the
13 relief.

14 But we reserve that to February 10th as to the
15 objections that are remaining on the docket, and would ask the
16 Court enter the order as revised and set forth in our reply
17 last night.

18 As Your Honor may have noticed, the entire section
19 relating to settlement procedures was struck. We are
20 working -- continue to work with the creditors' committee; we
21 had together done a great deal of work leading up to the filing
22 of the motion and subsequent. But there are a few areas that
23 we still wanted to work on cooperatively and thought better to
24 take the time and try to come back on a consensual basis as to
25 that portion of the order as well on February 10th.

1 THE COURT: That's fine. Let me just inquire if
2 there's anybody in the courtroom who objects to the entry of
3 this order in the form that it has been revised.

4 (No response)

5 THE COURT: There's no objection. I'll -- I will
6 enter the --

7 MS. HOLLEMAN: Your Honor, forgive me. On the
8 telephone speaking, Pamela Holleman, Sullivan & Worcester, for
9 the Finnish programs securities noteholders.

10 I just wanted to ask a point of clarification as I am
11 not in the courtroom and have not had the discussion with the
12 debtors with regards to outstanding objections being preserved.
13 And I just wanted to confirm that we are of record and that the
14 Finnish programs securities noteholders' objection likewise is
15 carried forward to February 10th. Is that correct?

16 MR. WAISMAN: Objection on the docket, 6490, is
17 preserved and carries to February 10th.

18 MS. HOLLEMAN: Thank you.

19 THE COURT: That's a pretty amazing display of recall
20 of the docket.

21 Okay, I guess we're done.

22 MR. WAISMAN: We are adjourned, Your Honor.

23 THE COURT: Thank you, we're adjourned.

24 (Proceedings concluded at 3:20 p.m.)
25

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C E R T I F I C A T I O N

I, Esther Accardi, certify that the foregoing transcript is a true and accurate record of the proceedings.

ESTHER ACCARDI (CET**D-485)

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